SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 804

HOWARD FARMER, PETITIONER,

vs.

ARABIAN AMERICAN OIL COMPANY.

No. 808

ARABIAN AMERICAN OIL COMPANY, PETITIONER,

vs.

HOWARD FARMER.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

INDEX

RECORD PRESS, PRINTERS, NEW YORK, N. Y., MAY 5, 1964

[fol. A]

IN UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

HOWARD FARMER, Plaintiff-Appellee,

against

ARABIAN AMERICAN OIL COMPANY (a Delaware corporation), Defendant-Appellant.

APPENDIX TO BRIEF FOR DEFENDANT-APPELLANT—
Filed December 19, 1962

[File endorsement omitted]

[fol. 1]

IN UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

HOWARD FARMER, Plaintiff,

against

ARABIAN AMERICAN OIL COMPANY (a Delaware corporation), Defendant.

AMENDED COMPLAINT—May 11, 1959

Plaintiff by William V. Homans, his attorney, respectfully shows to the Court and alleges:

First: Upon information and belief that at all times hereinafter mentioned, defendant was, and still is, a corporation organized and existing under the laws of Delaware, authorized to conduct business in the State of New York, and having its principal office at 505 Park Avenue, Borough of Manhattan, City and State of New York.

Second: That at all times hereinafter mentioned, plaintiff was, and still is, a duly licensed physician specializing in the practice of ophthalmology.

Third: That on or about the 13th day of April, 1955, plaintiff and defendant entered into an agreement whereby it was mutually agreed that for the duration of defendant's operation of its oil wells in the Kingdom of Saudi Arabia, plaintiff would be employed by defendant as an ophthalmologist in defendant's installation in the Kingdom of Saudi Arabia, and in consideration therefor defendant would pay plaintiff a salary of $16,000, plus $4,000 living allowance, per annum for such period. That in reliance upon such [fol. 2] promise and agreement by the defendant, plaintiff entered upon such employment.

Fourth: Plaintiff has duly performed all the terms and conditions of said agreement on his part to be performed until on or about the 12th day of March 1956, when defendant breached said contract on its part by discharging plaintiff from employment and refusing to permit him to continue therewith.

Fifth: That as a result of the premises plaintiff has suffered damages to the date hereof in the sum of $59,683, which is the amount plaintiff would have earned and received to date had it not been for the breach of said agreement by the defendant, less the sums earned by plaintiff in the interval.

Wherefore, plaintiff demands judgment against the defendant in the sum of $59,683, with interest from the dates of the payments due plaintiff, together with the costs and disbursements of this action.

William V. Homans, Attorney for Plaintiff.

Dated: May 11, 1959

[fol. 3]

IN UNITED STATES DISTRICT COURT

AMENDED ANSWER

Defendant,

1. Denies each allegation contained in paragraphs of the complaint marked "Fourth" and "Fifth".

2. With respect to paragraph of the complaint marked "First", admits that it was and still is a corporation organized and existing under the laws of Delaware and that it is authorized to do business in the State of New York.

Except as expressly admitted herein, denies each allegation contained in said paragraph of the complaint.

3. With respect to paragraph of the complaint marked "Second", admits that plaintiff was a duly licensed physician specializing in the practice of ophthalmology.

Except as expressly admitted herein, denies knowledge or information sufficient to form a belief as to each allegation contained in said paragraph of the complaint.

4. With respect to paragraph of the complaint marked "Third", admits that the plaintiff was employed by the defendant as an ophthalmologist in defendant's installation in Saudi Arabia, pursuant to written contract, a copy of which is attached hereto as Exhibit A. Denies knowledge or information sufficient to form a belief as to whether plaintiff entered upon such employment in reliance on this contract.

Except as defendant has expressly admitted herein or denied knowledge or information sufficient to form a belief, denies each allegation contained in said paragraph of the complaint.

[fol. 4]

As and for its First Affirmative Defense Alleges:

5. That the agreement alleged in paragraphs "Third", "Fourth" and "Fifth" of the complaint is void as a matter of law because it was not in writing.

As and for its Second Affirmative Defense Alleges:

6. If and in the event that it is found that plaintiff was employed by defendant for a term, defendant alleges that it terminated plaintiff's employment for good cause.

Wherefore, defendant demands judgment dismissing the complaint herein.

White & Case, By Orison S. Marden, A Member, Attorneys for Defendant, 14 Wall Street, New York 5, N. Y.

To:

William V. Homans, Esq., Attorney for Plaintiff, 122 East 42nd Street, New York 17, New York.

EXHIBIT A, TO ANSWER

Contract

(See opposite) ☞

ARABIAN AMERICAN OIL COMPANY
A CORPORATION
505 PARK AVENUE
NEW YORK 22, NEW YORK

EMPLOYMENT IN FOREIGN SERVICE

Dear Dr. Farmer:
Austin, Texas

This will confirm our offer of employment in the Company's Foreign Service to be effective on May 22, 1955
annual

Your rate of basic earnings will be U. S. $ 16,000.00

Your initial job classification will be Ophthalmologist

Benefits as provided in the New York Workmen's Compensation Law shall constitute the Company's entire liability and your exclusive remedy against the Company in the event of your disability or death whether arising out of or in the course of your employment or resulting from the use of transportation facilities operated by or for the Company.

Will you please confirm your acceptance of this offer by signing and returning two copies of this letter to us.

Very truly yours,

ARABIAN AMERICAN OIL COMPANY

By J. A. McDonald

ACCEPTED:

Howard Farmer
Employee's Signature

Mar. 26 1955

EMPLOYMENT IN FOREIGN SERVICE

Dear Dr. Farmer:
Austin, Texas

This will confirm our offer of employment in the Company's Foreign Service to be effective on May 22, 1955

Your annual rate of basic earnings will be U. S. $ 16,000.00

Your initial job classification will be Ophthalmologist

Benefits as provided in the New York Workmen's Compensation Law shall constitute the Company's entire liability and your exclusive remedy against the Company in the event of your disability or death whether arising out of or in the course of your employment or resulting from the use of transportation facilities operated by or for the Company.

Will you please confirm your acceptance of this offer by signing and returning two copies of this letter to us.

Very truly yours,

ARABIAN AMERICAN OIL COMPANY

By J. D. McDonald

ACCEPTED:

Howard Farmer
Employee's Signature

Date: May 26, 1955

AA-188 (12/53)

EA-1

[fol. 6]

IN UNITED STATES DISTRICT COURT

ORDER AMENDING COMPLAINT—June 17, 1960

The above matter having come on before this Court at Chambers on May 12, 1960, on plaintiff's motion to restore this cause for trial and the plaintiff having moved to amend the addendum clause in his complaint to increase the amount of damages demanded to $160,000, and defendant having moved for an examination before trial of plaintiff with respect to damages claimed by plaintiff, and plaintiff having moved to examine defendant by an executive officer with respect to the authority of Dr. Theodore E. Allen to make the contract claimed by plaintiff in his complaint, and the plaintiff having appeared by his attorney, William V. Homans, Esq. and Kalman I. Nulman, Esq. of counsel, and defendant having appeared by its attorneys, White & Case, Esqs., by Chester Bordeau, Esq. and William D. Conwell, Esq. of counsel; and due deliberation having been had, it is

Ordered:

(1) A motion made by plaintiff to amend the addendum clause in his complaint to increase the amount of damages demanded to the sum of $160,000 is granted;

(2) That on or before September 1, 1960 but not later than September 1, 1960, the plaintiff submit to an examination by defendant with respect to his damages, such examination not to be limited to the damages claimed to have been sustained by plaintiff since the time of the trial in 1959 and the time of a new trial but to be limited only by the elimination of any unnecessary repetition of questions heretofore asked of plaintiff;

(3) That on or before September 1, 1960 but not later than September 1, 1960, defendant by an executive officer shall submit to an examination by plaintiff with respect [fol. 7] to the authority of Dr. Allen to make the contract claimed by plaintiff in his complaint; specific scope of the examination as to particular questions will be ruled upon during deposition;

(4) If attorneys for the parties are unable to agree upon the dates for the aforesaid examination to be conducted on dates before September 1, 1960 then such dates shall be fixed by the Court upon two (2) days' application therefor; and

(5) The trial of this action is restored to the head of the trial jury calendar for October 1960 Term.

June 17, 1960.

Sylvester J. Ryan, U. S. D. J.

[fol. 8]

IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BILL OF COSTS TAXED OCTOBER 30, 1959

1. Attorneys' docket fees	$ 20.00	
2. Stenographers' fees for minutes of hearings and examinations before trial held on 10/8/56, 2/18/58, 1/22/59, 2/6/59, 5/5/59, 5/6/59 and 5/7/59	659.75 ~~697.55~~	
3. Stenographers' fees for minutes of the trial held on May 11-12-13-14-15-18-19-20-21, 1959	1,812.30	Objection overruled exception noted 163 F 2nd 924
4. Costs of making photostats of relevant exhibits	180.02	Objection overruled exception noted
5. EXPENSES OF WITNESS ELIAS FADDOUL:		
Two days attendance at court	8.00	
Five days travelling from Saudi Arabia to New York and back	20.00	Objection overruled exception noted 63 F. Sup. 924
Subsistence during period travelling to and from New York and during period of attendance at court (7 days)	56.00	
Lowest cost first class passage round trip between Saudi Arabia and New York	1,531.50	

[fol. 9]

6. Expenses of Witness Dr. Robert C. Page:		
Eight days attendance at court	$ 32.00	Objection overruled exception noted
Five days travelling from Saudi Arabia to New York and back	20.00	
Cost of transportation by company plane round trip between Saudi Arabia and New York	1,032.00	see ruling item #5
Subsistence during period travelling to and from New York and during period of attendance at court (13 days)	104.00	
7. Expenses of Witness Marjorie Catherine Swanson, R. N.		
8 days attendance at court	32.00	
5 days travelling from Saudi Arabia to New York and back	20.00	
Cost of transportation by company plane round trip between Saudi Arabia and New York	1,032.00	see ruling item #5
Subsistence during period travelling to and from New York and during period of attendance at court (13 days)	104.00	
Subsistence during one day's attendance for deposition	4.00	
8. Expenses of Witness Frank Born, M. D.		
6 days attendance at court	24.00	
9. Expenses of Witness Harold Lohnaas, M. D.		
4 days attendance at court in connection with trial	16.00	
1 day's attendance at court in connection with deposition	4.00	Objection overruled exception noted
Expenses of transportation for appearances at court from Atlantic Highlands, New Jersey to New York (100 miles round trip)	24.00	

[fol. 10]

10. Expenses of Witness Alice Neal, R. N.

2 days attendance at court in connection with trial	$ 8.00
2 days travelling to New York from Wilmington, Delaware and back	8.00
Lowest cost first-class passage round trip between Wilmington, Delaware, and New York	21.46
Subsistence during period travelling to and from New York and during period of attendance at court (4 days)	32.00

11. Expenses of Witness Al Heinz:

Objection overruled exception noted

1 day's attendance at court during trial	4.00
Travelling to court from Wantagh, Long Island and back (50 miles round trip)	~~4.00~~

12. Expenses of Witness Richard L. Meiling, M. D.

Objection overruled exception noted

1 day attendance at court in connection with trial	4.00
Subsistence during period travelling to and from New York and during period of attendance at court (1 day)	8.00
Lowest cost first class passage round trip between Columbus, Ohio, and New York	74.25

13. Expenses of Witness Dominick A. Binetti

Objection overruled exception noted

1 day attendance at court in connection with trial	4.00

Total	~~$6,941.08~~
Oct. 30, 1959 Costs Taxed in Sum of	$6,899.28

Herbert A. Charlson,
Clerk.

By Gilbert E. Surdez,
Deputy Clerk.

[fol. 11]

IN UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

AFFIDAVIT OF CHESTER BORDEAU SWORN TO OCTOBER 26, 1959 IN SUPPORT OF BILL OF COSTS

State of New York,
County of New York, ss.:

CHESTER BORDEAU, being duly sworn, says:

I am an attorney associated with White & Case, attorneys for the defendant. I have been and am in charge of the defense of this action; I tried it before Judge Palmieri. The costs outlined in the Notice of Taxation submitted herewith were necessarily incurred in connection with the defense of this action. I make this affidavit to explain more fully the nature of the various items which appear on the Notice of Taxation.

1. *Docket Fee*: This fee of $20 was incurred and is allowable under U. S. C. A. §1923.

2. *Stenographers' fees for minutes of hearings and examinations*:

Throughout the course of this case opposing attorneys had lengthy and troublesome disputes concerning what had been said at various proceedings. It became apparent to me that orderly procedure made it imperative that all statements made, be taken on the record in order to obviate such disputes.

An example of the difficulties encountered in this respect is the dispute concerning what was said by Court and counsel at the oral argument of a motion on February 18, 1958 before Judge Weinfeld which we had transcribed. This motion was made by defendant for permission to [fol. 12] amend its answer to assert the statute of frauds as a defense and for summary judgment based on this defense. Judge Weinfeld made various statements in connection with the argument and in deciding to permit the defendant to amend its answer.

No sooner was the motion decided, than there was dispute concerning what Judge Weinfeld had said and what the attorneys for both parties had said. This dispute began with a letter from plaintiff's attorney to me dated March 18, 1958 and a letter from him to Judge Weinfeld in connection with the proposed order disposing of said motion. We replied on March 19, 1958. An additional letter was sent by plaintiff's attorney to Judge Weinfeld dated March 20, 1958. Finally the order of Judge Weinfeld was signed.

Plaintiff then made a motion before Judge Dimock (the argument of which was not transcribed) in which plaintiff requested that defendant be directed to produce for inspection, defendant's concession agreement with the Kingdom of Saudi Arabia. Plaintiff contended that this was related to the motion before Judge Weinfeld and referred to statements made by Judge Weinfeld and by opposing counsel on the argument of the motion before Judge Weinfeld. At the argument of the motion before Judge Dimock and in later correspondence the actual transcript was referred to in settling the dispute. The dispute consisted of the following letters after the argument of the motion: a letter from plaintiff's attorney dated March 24, 1958 which was replied to on March 26, 1958; an additional letter from plaintiff's attorney on March 27, 1958; replied to on March 28, 1958; plaintiff's attorneys wrote an additional letter on March 31, 1958 to which we did not reply.

Even on later occasions (at pretrial conferences and at the trial) defendant found it necessary to refer to the transcript of the argument of the motion before Judge Weinfeld to correct what it considered plaintiff's misstatements of

[fol. 13]

what had been said. Thus it is apparent from this outline that it was vitally necessary for defendant to have minutes taken of the argument of this motion as well as of all later proceedings.

It was necessary to have all testimony transcribed not only for use in connection with examination of witnesses but also because there were several important questions of law to be resolved. These questions included the application of the Statute of Frauds to the alleged oral contract and the effect of the Parol Evidence Rule on the facts testified to. In order to resolve both of these questions it was imperative to have the exact testimony of the various witnesses. The following is a breakdown of the minutes taken:

10/8/56: Examination before trial of plaintiff. Excerpts from this examination were read at the trial in order to compare statements made on this examination with statements made by plaintiff at the trial. It was also used as a basis for investigation; it was also used in connection with preparation of the defense. A large number of pages of this examination were read into the record of the trial and were actually requested by the jury for use in their deliberations.....	$188.00	Objection overruled exception noted.
2/18/58: Transcript of argument before Judge Weinfeld of the motion to obtain summary judgment on behalf of defendant on the basis of statute of frauds. Discussed *supra*	17.60	
1/22/59: Pretrial hearing before Judge Palmieri in connection with answers to numerous interrogatories propounded of plaintiff by defendant. Rulings by Judge Palmieri on these interrogatories. This transcript was necessary in order to have a record of the numerous rulings made as well as of statements and representation of counsel.....	89.70	Objection overruled exception noted.

[fol. 14]

2/6/59: Hearing before Judge Palmieri in which rulings were obtained on: 1. the date of trial; 2. plaintiff's request that defendant amplify its answer as to the reasons why it discharged plaintiff; 3. defendant's request that plaintiff specify the total amount of damages he requests in this action rather than in a series of actions. This transcript was extremely useful since Judge Palmieri cited cases in support of his rulings	26.65	
5/5/59: Deposition of Nurse Swanson and Dr. Lohnaas which were conducted by the plaintiff immediately prior to the trial. It was necessary for defendant to obtain copies of this transcript so that it would have them in time for the trial. These transcripts were read from and used at the trial. These were two vital witnesses	298.20	Objection overruled exception noted.
5/6/59: Deposition of plaintiff by order of Judge Palmieri. This deposition was necessary in order for defendant to question plaintiff concerning damages and other matters transpiring since the date of the last examination of plaintiff which was held almost three years earlier	39.60	Objection overruled exception noted
5/7/59: Pretrial hearing before Judge Palmieri with reference to a request by plaintiff that additional witnesses be produced for examination before trial; also with reference to various other questions which might arise at the trial including admissibility of evidence, and questions to be asked on the *voir dire*	37.80	Objection sustained exception noted. Rulings by Court at time of hearing.

All of these depositions and pretrial conferences pertain to issues relevant to this action. Transcripts of these pro-

[fol. 15] ceedings were necessary in order for defendant to prepare for trial and in order for defendant to conduct the trial of this action. They proved an invaluable aid in refreshing the recollection of witnesses, as a check on the veracity of witnesses, and as an aid in making a record of what had transpired including rulings of the court. The depositions referred to were all used during the trial and were read from during the trial.

3. *Stenographers' fees for minutes of trial:*

It was necessary for defendant to obtain a transcript of the trial of this action as it proceeded. A copy of this transcript was furnished to and used by the court. The trial of this case lasted 8 days and the exact phraseology used by the witnesses was of extreme importance. It was of particular importance in connection with the defense of the statute of frauds and in connection with the application of the Parol Evidence Rule. These defenses depended to a great extent upon the exact words used by various witnesses in stating what the terms of plaintiff's employment contract were.

The actual transcript was not only referred to and read by defense counsel into the record at the trial, but it was also referred to and read from by the court.

The jury also requested that various portions of the transcript be sent to them to assist them in their deliberations. Pages from the transcript were actually cut from the volume and sent to the jury and marked as exhibits.

The transcript was also of extreme importance inasmuch as it was necessary for the court to rule on various questions of law during the trial. The transcript with reference to these rulings was actually referred to by the court and counsel at various stages of the trial. Without the transcript as the trial proceeded, confusion and prejudice would have resulted. Because of these factors, it was necessary to obtain a daily transcript of what transpired at this trial.

[fol. 16] 4. *Cost of photostating exhibits*:

It is well established that the cost of photostating exhibits is allowable under 28 U. S. C. A. §1920(4). The bulk of the exhibits for which costs are requested consisted of pages from the American Medical Journal. By photostating these pages it was possible to avoid the inconvenience of handling stacks of actual medical journals which were heavy and cumbersome.

5. *Expenses of witnesses*:

The witnesses who were called to testify on behalf of the defendant and whose expenses are set forth in the notice of taxation were all witnesses of the events which formed the basis of plaintiff's claim. Failure to call any of these witnesses would have been prejudicial to defendant and might have caused unfavorable comment by plaintiff. In my opinion all of the witnesses who testified were vitally necessary in order to present the full facts to the court. An example of the necessity of these witnesses testifying is that of Nurse Faddoul. Defendant learned at the trial, for the first time, that plaintiff claimed he received a laboratory report from Nurse Faddoul, a vital fact at issue. When defendant learned of this it immediately contacted Saudi Arabia and had Nurse Faddoul flown to New York.

For the above reasons the costs set forth in the notice of taxation were incurred by defendant and were necessary in connection to its defense of this action.

Chester Bordeau

Sworn to before me this 26th day of October, 1959.

Robert A. Perkins, Notary Public-State of New York, No. 41-832750-Queens County, Certificate filed in New York County, Term Expires March 30, 1962.

[fol. 17]

AFFIDAVIT OF T. DARRINGTON SEMPLE

State of New York,
County of New York, ss.:

T. Darrington Semple, Jr., being duly sworn says:

I am an attorney employed by Arabian American Oil Company. I was assigned to supervise the defense of the instant action. In this connection I have approved and caused to be paid various bills in connection with this case. All of the items of expense set forth in the bill of costs were actually incurred and paid by the defendant in this action to my own personal knowledge. In my opinion all of these costs were necessary to the defense of this action.

T. Darrington Semple, Jr.

Sworn to before me this 26 day of October, 1959.

Helen L. Babigian, Notary Public, State of New York, No. 03-0123070, Qualified in Bronx County, Commission expires March 30, 1961.

[fol. 18]

IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF CHESTER BORDEAU, SWORN TO DECEMBER 2, 1959 IN OPPOSITION TO MOTION TO REVIEW TAXATION OF BILL OF COSTS

State of New York,
County of New York, ss.:

Chester Bordeau, being duly sworn says:

I am an attorney associated with White & Case, attorneys for the defendant.

I make this affidavit in opposition to plaintiff's motion to review the taxation of costs made by the Clerk of this Court and to set forth the reasons why said taxation and allowance of costs were correct and proper. The two major items of cost objected to by plaintiff are 1. the transcript of testimony and rulings and 2. the cost of transporting witnesses here from Saudi Arabia.

I. *Cost of Transcripts.*

The cost of the transcript of testimony at the trial is Item 3 on the Bill of Costs ($1,812.30) and the cost of the transcript of depositions read at the trial and of pre-trial conferences and the hearing of one motion are Item 2 ($659.75).

That these transcripts are vitally necessary in this trial is apparent from the transcripts themselves. The following are excerpts from the record of the trial:

> "Mr. Nulman: I object on the ground that when I attempted to elicit this matter on my redirect the court sustained defense counsel's objection to that line of questioning.
>
> "Mr. Bordeau: With reference to Mr. Nulman's wanting to go into the merits of that case, your Honor suggested, as I remember it, that the merits of the case should not be gone into. I think that is all that [fol. 19] was done yesterday. I am not talking about the merits of the case.
>
> "Mr. Nulman: I think that is highly unfair and prejudicial for counsel to so state. I started to interrogate, objection was made, and your Honor directed me to ask no further questions and I desisted.
>
> "The Court: I don't believe I ruled out any question at all with respect to the litigation. I merely wish to avoid any inquiry into the issues of any other litigation, or the nature of any other litigation, and I have already stated on the record the limited purpose for which I would permit reference to other litigation. *I am trying to find the place in the record at which this occurred. As soon as I do, I will be able to speak with greater reliance.*
>
> "Mr. Nulman: I respectfully suggest to your Honor that merely eliciting the fact of the existence of the lawsuit gives rise to many implications which I have a right to rebut by showing the nature of that litigation, and that was my argument yesterday, and I respectfully repeat it today.

"The Court: Do I understand you correctly then to say that you withdraw your objection provided you can go into the nature of this litigation?

"Mr. Nulman: No, your Honor, I don't want to withdraw the objection on the basis that was advanced yesterday. I would like rulings made as we proceed, and I say that if it was proper to sustain an objection yesterday, then it ought to be sustained today.

"The Court: I think you are quite right. The law does not change from day to day, if that is what you are implying.

"Mr. Nulman: No, I wasn't, your Honor. I was making no such implication. *I was suggesting that the rulings change from day to day.*

[fol. 20] "The Court: *You are making that suggestion. I suggest you had better point out in the record wherever the rulings changed from day to day, and I assure you it will be corrected so they will be fully consistent and in conformity with prior rulings.*

"Mr. Nulman: I must say that I don't believe it serves my client's interest for me to engage in this. I simply state the fact that I object on the ground stated.

"The Court: *I am trying to find the place. As soon as I do, we can make some progress.*

I think it begins at page 221, the series of questions with respect to Robert Farmer.

"Mr. Bordeau: If your Honor please, may I submit to you my copy of the transcript of yesterday and refer you to pages 251 and 252?

"The Court: I have just read it.

There was a comment which I had opposed on page 252, and there was colloquy that occurred on pages 252 and 253 of the record.

"Mr. Nulman: So that there may be no misunderstanding, your Honor, I do not have a copy of the record.

"The Court: I will show it to you.

"Mr. Nulman: I quite accept what your Honor states, but I merely wanted you to know I didn't have it.

"The Court: Very well, I will make sure that you take a look at this before I make a ruling.

Yesterday I said this, and I adhere exactly to what I said yesterday." (reading transcript) (pp. 314-317 emphasis added)

• • • • • • •

"The Court: This is your trial, this is your only trial, and when you submitted on the first day of trial [fol. 21] an amended complaint in which you claimed damages only those damages which apply to the period between the date of the discharge and the date of the trial, I asked you point blank whether you were attempting, by that maneuver, to reserve to yourself the right to claim damages at a subsequent time, and you said that you had no such intention whatsoever, and I want to refer you to the record.

"I refer you to pages 2 and 3 of the record in which I made it perfectly clear, and I quote:" (pp. 1018-1019)

• • • • • • •

"Mr. Nulman: • • • Now, we are not altogether sure that good motives or good faith are issues in this case—

"The Court: Oh, how can you say it? How can you say it?

Let me read your opening to the jury. It is fantastic to me that you can make that statement—

"Mr. Nulman: Your Honor, I said—

"The Court: Just a minute. *I want to stop you right there because this record will be in a state of frightful confusion, and I want to help any appellate court that is going to have this case.*

"Mr. Nulman: Your Honor, I know what—

"The Court: This is your opening to the jury. I will read from the bottom of page 11:" (reading) (pp. 1027-1028)

In connection with a lengthy conference in connection with the admission of exhibits, Judge Palmieri stated:

"Mr. Nulman: May I recall to your Honor certain facts with relation to Dr. Allen—

[fol. 22] "The Court: No. We have been in this conference now for 45 minutes, *and as you see, I have had the benefit of this record, which I have been taking home every night and reading, so I have a pretty good idea—*

"Mr. Nulman: I was going to point out that this letter has a direct bearing on what I consider an improper issue injected by Mr. Bordeau wherein he was permitted to put into evidence the original complaint showing only that we asked for $4000 damages, and this letter indicates—

"The Court: Where he was permitted to put in. Did you object?

"Mr. Bordeau: He did not object.

"Mr. Nulman: I did object.

"Mr. Bordeau: He did not object.

"The Court: Let's get that right away. When did you put it in?

"Mr. Bordeau: On the cross examination of Dr. Farmer.

"Mr. Nulman: I don't remember—I just—

"The Court: You have just made a statement that he was permitted to do something over your objection. I am going to stop this right now. *You have been making statements all along in this case that haven't been in accord with my recollection, and I want to stop it right now, if I can, by reference to the record.*" (reads record) (1249-1252)

Even the jury felt the need for the transcript. After hours of deliberation they made the following request:

"The Court: Counsel have just completed examining the record for the purpose of answering the following note from the jury:

[fol. 23] Can we see Dr. Farmer's *pretrial* testimony regarding the receipt of blood test and urinalysis report—and *trial* testimony of above-mentioned matter?"

(Above note marked Court's Exhibit 5 in evidence.)

"The Court: My judgment is that since they requested to see these minutes, they should be permitted

to do just that. Unless counsel have some objection my judgment would be to remove those pages of the record which counsel have agreed complies with this request and have those pages sent in.

"Mr. Homans: Your Honor, I think that probably reading them would be the best procedure because there are probably other things on the pages which they might not be interested in.

"The Court: If they do not pertain to this subject I suggest cutting them out. Mr. Homans was saying there might be other things on certain pages which did not pertain to this subject, and my suggestion was just to cut them out.

"Here is my thought, Mr. Homans: reading testimony is the usual practice, but it has this disadvantage, that some persons have good oral sensibilities; others do not. And it might cut both ways. There might be some difficult aspects of it that will bounce off some of those and catch others, whereas this way I think they will all get whatever benefit is to be gotten from it by seeing it, and the request is to see it, and I always like to adhere precisely to what the jurors ask for.

"Now, since this is the trial testimony and they have asked to see it, it is my judgment that they should be permitted to do just that." (pp. 1409-1410)

[fol. 24] To comply with that request it was necessary for counsel to examine the entire transcript. The testimony requested was given at a number of different places in this 1400 page record. It would have been a physical impossibility for a reporter in any reasonable length of time to have been able to find such testimony and put it together. It was necessary for the attorneys to glance at almost every page of the transcript to find this testimony. For a reporter to find it would have meant practically a complete re-reading to the attorneys of the entire record.

It is apparent from the quotations from the transcript given above why it was necessary for the pretrial hearings at which Judge Palmieri made numerous important rulings governing the trial and at which counsel made stipulations and representations, to be transcribed. The same is true

with reference to the argument of the motion before Judge Weinfeld as outlined in my affidavit sworn to October 26, 1959. If these proceedings had not been transcribed there would have been endless dispute concerning what had been said.

For these reasons and for the reasons set forth in my affidavit sworn to October 26, 1959 submitted in support of the Bill of Costs, it is apparent that these transcripts were necessarily obtained for use in this case. The trial was long, the factual issues complex and closely contested. The transcript was used by the Court, by counsel and was requested by the jury. The taxation of the costs of this transcript by the Clerk of this Court should therefore be affirmed.

Plaintiff objects to taxing the cost of the transcript of the trial claiming that it was not necessary, that he did not get a copy and that it was not filed. We have shown *supra*, it was necessary. Plaintiff could have ordered a copy for himself—defendant has no obligation to pay for a copy for [fol. 25] plaintiff. The transcript was filed. As is apparent from the above excerpts the trial judge at all times had a copy of the transcript which he read and studied. In fact the transcript furnished Judge Palmieri by defendant and filed by Judge Palmieri was used by plaintiff in the making of his record on appeal.

Plaintiff also objects to taxing the cost of the transcripts of the depositions of Swanson and Lohnaas. The trial was scheduled to begin and did begin on Monday, May 11, 1959. On May 5, 1959, a Tuesday, plaintiff spent most of the day examining these two key defense witnesses.

Since there were literally only three business days between these depositions and the trial, it was imperative for defendant to be certain that the transcript of these examinations was available to it before the trial. Defendant had no way of knowing when these witnesses would actually be called to testify; when they testified would depend on when plaintiff's testimony was completed which could easily have been the first day of trial. In order to be certain that defendant had this transcript prior to the trial defendant had the Southern District Court reporters

transcribe this testimony rather than rely on receiving a copy from the private firm hired by plaintiff.

Plaintiff also objects to taxing the cost of transcript of the deposition of plaintiff taken just before the trial. The purpose of this examination was to fill in the gap since plaintiff's original examination several years before. The subject of this examination was activities of plaintiff since his last examination; such activities related to efforts to mitigate damages, etc.

Defendant objects to Item 9 which is the expense of transporting Dr. Lohnaas from his New Jersey home to court. (Item 9) Dr. Lohnaas was not working at defendant's New York Office at the time of the trial and would [fol. 26] have stayed in New Jersey during this period if he had not been required to come here to testify.

II. *Photostats*

It cost $180.02 to photostat relevant pages from the AMA Journal. This cost was necessary to avoid working with complete heavy volumes of these journals which literally required three men to carry. The pages were relevant and were marked in evidence.

For these reasons the taxation of costs by the Clerk of this Court should be affirmed.

Chester Bordeau.

Sworn to before me this 2nd day of December, 1959.

Robert A. Perkins, Notary Public, State of New York, No. 41-8327500. Qualified in Queens Co., Cert. filed with N. Y. Co. Clks. Off., Commission Expires March 30, 1960.

[fol. 27]

IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF E. PAUL MILLER SWORN TO DECEMBER 2, 1959 IN OPPOSITION TO MOTION TO REVIEW TAXATION OF BILL OF COSTS

State of New York,
County of New York, ss.:

E. PAUL MILLER, being duly sworn, deposes and says:

That he is employed by the Arabian American Oil Company in the Transportation Section of the Personnel Department and in such capacity has charge of making reservations and purchasing airline tickets for employees of the Arabian American Oil Company who will be travelling on company business. In such capacity your deponent is familiar with the cost of air transportation and makes this affidavit in support of the taxation of costs done by the Clerk of this Court. In particular, I make this affidavit with reference to Item 5 of the Bill of Costs to show that the lowest cost first class air fare round trip between New York and Dhahran, Saudi Arabia is $1,531.50 and to establish that defendant in fact paid that amount to transport the witness Fadoul here.

Attached hereto as Exhibit "A" is a photostatic copy of the receipted Trans-World Airways, Inc. invoice for $1,531.50 paid by the defendant for the transportation of witness Elias Fadoul. Attached hereto as Exhibit "B" is a schedule from Trans-World Airways, Inc. showing that this is the lowest cost first-class passage between Saudi Arabia and New York.

Attached as Exhibits "C" and "D" are publications of other airlines showing their rates. Exhibit "E" is an excerpt from the Official Airline Guide, World Wide Edition showing the rates for all airlines are the same.

On information and belief they are the same because all international air fares to and from the United States [fol. 28] are controlled by treaty and various United States Governmental organizations.

E. Paul Miller

Sworn to before me this 2nd day of December, 1959.

William M. Trust, Notary Public, State of New York, No. 24-4027650, Qualified in Kings County, Certs. filed with Kings & N. Y. Co. Clk's., Term Expires March 30, 1961.

In United States District Court

Affidavit of Robert J. Shea, Sworn to December 2, 1959 in Opposition to Motion to Review Taxation of Bill of Costs

State of New York,
County of New York, ss.:

Robert J. Shea, being duly sworn, deposes and says:

That he is an accountant employed in the Comptroller's Department of the Arabian American Oil Company and as such has charge of and is familiar with the method by which the Arabian American Oil Company computes its costs for air travel on company plane to and from Dhahran, Saudi Arabia.

I make this affidavit in support of the taxation of costs done by the Clerk of the Court with particular reference to Items 6 and 7 of the Bill of Costs. These items represent [fol. 29] the cost of transporting two witnesses (Page and Swanson) by company plane to New York from Saudi Arabia and back.

The amount of $1,032 which has been taxed as the cost of transporting each of these witnesses represents the actual cost to defendant of transporting these witnesses. This amount is about $500 less than the lowest cost first class passage on commercial airlines as outlined in the affidavit of Paul E. Miller submitted herewith. This actual cost is arrived at by computing the total cost to defendant on a yearly basis of the operation of its airplanes.

In computing the actual cost of operation of such planes defendant includes the cost of gasoline, lubrication, crew salaries, crew expenses, meals for crew and passengers, crew personnel training, office operating expense at Idle-

wild allocable to such planes, charges for maintenance materials, maintenance personnel, ground approach services, landing, parking and storage fees at airports, ground handling charges, cost of inspection, repair and overhaul of aircraft, engine, propellers, parts and assemblies, etc.

Defendant then totals the number of passengers and pounds of freight it carries in a particular year and these figures are then converted into what it would cost to ship these goods or to fly these persons via commercial airlines. These figures are totalled to show what commercial costs would be.

The commercial costs used are the standard public tariffs as set forth in the "Official Airline Guide" which publishes the public tariffs set by the airlines in accordance with U. S. Governmental agencies and international treaty. The commercial rates are then totalled and this figure is divided into Aramco's cost figure to receive the percentage of the Arabian American Oil Company's costs as compared to commercial costs. This percentage figure is then used [fol. 30] to show what it costs the Arabian American Oil Company for each individual to fly on its planes.

This computation is made each year on the basis of an estimate of costs and travel load. At the end of each year the estimate is adjusted to accord with what the actual facts are.

These estimated figures from the years 1955 to 1958 have never varied from the actual costs by more or less than 11.4%, with an average of 5.54%. For the year 1959 the actual cost of such transportation per passenger was estimated to be $1,032.00 which is the amount taxed as costs in Items 5 and 6 of the Bill of Costs and which is about $500 less than the lowest cost first class passage.

R. J. Shea.

Sworn to before me this 2nd day of December 1959.

William M. Trust, Notary Public, State of New York, No. 24-4027650, Qualified in Kings County, Certs. filed with Kings & N. Y. Co. Clk's., Term Expires March 30, 1961.

[fol. 31]

Appearances:

William V. Homans, Esq., Attorney for Plaintiff, 122 East 42nd Street, New York City.

White & Case, Esqs., Attorneys for Defendant, 14 Wall Street, New York City.

Chester Bordeau and William Conwell, Esqs., of Counsel.

OPINION—December 10, 1959

PALMIERI, J.

This is a motion brought by plaintiff, the losing party in the above-entitled action, to review the rulings of the Clerk of this Court in taxing certain costs and for an order retaxing costs.

Plaintiff questions the propriety of costs allowances for the following items:

1.	Stenographers' fees for minutes of pretrial hearings	$ 133.95[1]
2.	Stenographers' fees for examination before trial	
	(a) Depositions of Marjorie Catherine Swanson, R.N., and Dr. Harold Lohnaas	298.20
	(b) Deposition of the plaintiff	39.60

[fol. 32]

3.	Stenographer's fees for daily minutes of the trial	1,812.30
4.	Costs of making photostats of relevant exhibits	180.02

[1] Plaintiff, through inadvertence, lists among his objections stenographer's fees for a hearing held on May 7, 1959. The Clerk sustained plaintiff's objection to this item and made the necessary deduction from the bill of costs.

5. Expenses of witnesses

(a) Elias Faddoul ..... ($1,531.50 of the total represents cost of transportation)	1,615.50
(b) Dr. Robert C. Page ..... ($1,0[illegible] represents cost of transportation)	1,188.00
(c) Marjorie Catherine Swanson, R.N. ($1,032 represents cost of transportation)	1,192.00
(d) Dr. Harold Lohnaas	44.00

1. Stenographers' fees for minutes of pre-trial hearings.

Plaintiff objects to the charges for transcripts of the minutes of three pre-trial hearings. In view of the nature and extent of these conferences and the importance of the rulings which were entered, I am of the opinion that it was necessary to have a full record of the arguments, stipulations, and representations made by counsel. Since I have concluded that the transcripts were essential to a proper understanding of matters covered at the conferences and that reliance on memory and notes would have placed a severe burden on the Court as well as counsel, I exercise my discretion to allow these costs as taxed by the Clerk. See Rule 54(d), Fed. R. Civ. P. and 28 U. S. C. §1920(2), *Bank of America* v. *Loew's International Corp.*, 163 F. Supp. 924, 931-32 (S. D. N. Y. 1958).

[fol. 33] 2(a). Depositions of Marjorie Catherine Swanson, R.N., and Dr. Harold Lohnaas:

Examinations of these important witnesses were conducted by the plaintiff on May 5, 1959. Rather than rely on receipt of copies from the plaintiff, who had hired a private reporter, defendant ordered the preparation of additional transcripts by a court reporter. However, immediately prior to the trial, which commenced on May 11, 1959, plaintiff did furnish defendant with copies of the depositions. I agree that transcripts of the depositions were necessary for use in the case. However, I cannot agree that

plaintiff failed to do all that the circumstances required when he deliverd copies just before the trial. During the six days which elapsed between the examinations and receipt of plaintiff's transcripts defense counsel had recourse to his notes and fresh recollection of the depositions. I believe that the precaution which defendant took in ordering its own copies was for its own convenience and cannot be properly charged against plaintiff. See *Cooke* v. *Universal Pictures Co.*, 135 F. Supp. 480, 482 (S. D. N. Y. 1955). Accordingly, I sustain plaintiff's objection and direct that the charge of $298.20 be disallowed.

2(b). Deposition of Plaintiff.

Plaintiff objects to the charge for the examination conducted on May 6, 1959 on the ground that defendant had conducted an earlier examination of plaintiff on October 8, 1956. Plaintiff sought to recover for breach of an employment contract. More than two and a half years had elapsed since the date of the first deposition. In view of the extensive damages claimed by plaintiff at this stage of the case, defendant could not adequately prepare for trial without supplemental information relating to plaintiff's efforts to mitigate damages and other events which had transpired since the date of the first examination. Under the circum- [fol. 34] stances the cost of the transcript of plaintiff's second deposition was properly taxed as an item "necessarily obtained for use in the case." 28 U. S. C. §1920(2), *Perlman* v. *Feldmann*, 116 F. Supp. 102 (D. Conn. 1953), *reversed on other grounds*, 219 F. 2d 173, *cert. denied*, 349 U. S. 952 (1954); 4 Moore, Federal Practice, ¶26.36 (2d ed. 1950).

3. Stenographer's fees for daily minutes of the trial.

On frequent occasions throughout the course of this trial the Court and counsel found it necessary to review prior testimony, issues and rulings. At such times, the daily transcript was more than a helpful aid to the Court. To avoid disagreements with respect to the prior course of the trial proceedings it became essential to have the record on hand for constant and immediate reference. In view of the many difficulties which were resolved by recourse to

the daily minutes, I find no merit to plaintiff's objection that the transcript was not necessary for the conduct of the trial. I therefore affirm the Clerk's allowance of costs for the full stenographic transcript of trial proceedings. See *Bank of America* v. *Loew's International Corp., supra.*

4. Costs of making photostats of relevant exhibits.

To avoid the considerable inconvenience of dealing with a number of publications which in the aggregate would have been heavy and cumbersome, defendant prepared photostats of relevant pages from medical journals. I find that these photostats were "necessarily obtained for use in the case" and therefore affirm the taxation of this item by the Clerk. See 28 U. S. C. §1920(4), *Brookside Theatre Corp.* v. *Twentieth Century-Fox Film Corp.*, 11 F. R. D. 259, 266 (W. D. Mo. 1951).

5. Expenses of witnesses.

(a) Elias Faddoul, (b) Dr. Robert C. Page,

(c) Marjorie Catherine Swanson, R.N.

[fol. 35] The costs of subsistence and the per diem allowances for time spent in court and in travelling from Saudi Arabia to New York and back were properly taxed. 28 U. S. C. §1821 (1958). As to witness Faddoul, defendant has submitted adequate proof that it paid the amount of $1,531.50 for air transportation and that this sum represents the lowest first-class rate. The Clerk's action in taxing in full the expenses of witness Faddoul is affirmed. See *Bank of America* v. *Loew's International Corp., supra.* Decision is reserved as to the allowance of the costs of air transportation for Dr. Page and Nurse Swanson pending receipt of a supplementary affidavit from defendant. In the affidavit, defendant should set forth the defendant's policy, if any, with respect to the full use of cargo and passenger transportation space on company planes and the extent to which capacity loads were carried. Defendant should also state, if possible, whether defendant's planes operated on fixed schedules, regardless of loads, whether full loads

were carried on the dates these witnesses were passengers, and whether space would have remained vacant if Dr. Page and Nurse Swanson had not occupied seats.

(d) Dr. Harold Lohnaas.

The Clerk's taxation of costs in the amount of $20.00 for Dr. Lohnaas' attendance at court is affirmed. 28 U. S. C. §1821 (1958). Decision is reserved as to the allowance of $24.00 for transportation expenses pending receipt of an affidavit from Dr. Lohnaas or his immediate supervisor stating the nature of his duties and responsibilities and the place where they would have been performed if Dr. Lohnaas had not been in attendance at court.

Conclusion

The Court affirms the taxation of costs by the Clerk with the following exceptions:

[fol. 36] 1. The sum of $298.20 for the depositions of Marjorie Catherine Swanson, R.N., and Dr. Harold Lohnaas is disallowed;

2. The sum of $2,064.00, representing air transportation costs for Dr. Robert C. Page and Marjorie Catherine Swanson, R.N., shall not be included in the judgment until further order of the Court;

3. The sum of $24.00 for transportation expenses of Dr. Harold Lohnaas shall not be included in the judgment until further order of the Court.

So Ordered.

Dated: New York, N. Y.
December 10, 1959

Edmund L. Palmieri, U. S. D. J.

[fol. 37]

IN UNITED STATES DISTRICT COURT

Appearances:

William V. Homans, Esq., Attorney for Plaintiff, 122 East 42nd Street, New York City.

White & Case, Esqs., Attorneys for Defendant, 14 Wall Street, New York City.

Chester Bordeau and William Conwell, Esqs., of Counsel.

OPINION—February 9, 1960

PALMIERI, J.

On December 10, 1959, in response to a motion brought by the plaintiff, the Court reviewed the rulings of the Clerk in taxing costs and reserved decision as to two specified items pending receipt of supplemental affidavits from the defendant.

The defendant has complied with the Court's direction and has submitted requested information as to the following items:

1. Air Transportation Costs for Dr. Robert C. Page and Marjorie Catherine Swanson, R.N.	$2,064.00
2. Transportation Expenses of Dr. Harold Lohnaas	24.00

1. It appears from the affidavit of the defendant's Aeronautical Engineer that Dr. Page and Nurse Swanson were transported on company planes which operated on fixed schedules and that on the dates these witnesses travelled there was vacant passenger space on board the planes. While there would have been unoccupied seats [fol. 38] whether or not Dr. Page and Nurse Swanson were assigned to flights, it cannot be said that the defendant incurred no expense in bringing these important witnesses to New York to appear at the trial. The method which the defendant used to allocate the costs of operating its airlines

appears to accord with sound accounting practice. Therefore, the pro rata share attributed to the flights of Dr. Page and Nurse Swanson, which is considerably lower than the cost of commercial airline travel, was properly taxed by the Clerk. See *Bank of America* v. *Loew's International Corp.*, 163 F. Supp. 924, 928-30 (S. D. N. Y. 1958); *Maresco* v. *Flota Mercantile*, 167 F. Supp. 845 (E. D. N. Y. 1958).

2. The affidavit of the Physician in charge of the defendant's Medical Department in New York states that the defendant did not require the services of Dr. Lohnaas in New York and that his trips during the trial were especially for the purpose of giving testimony. In view of these representations I find that the travel allowance for Dr. Lohnaas of $24.00 was properly taxed by the Clerk.

Conclusion

The Court affirms the allowance of costs by the Clerk as to both of the above-mentioned items.

So Ordered.

Dated: New York, N. Y.
February 9, 1960

Edmund L. Palmieri, U. S. D. J.

[fol. 39]

IN UNITED STATES DISTRICT COURT

BILL OF COSTS TAXED JULY 7, 1961

I. COSTS INCURRED IN CONNECTION WITH THE FIRST TRIAL OF THIS ACTION IN MAY 1959		Objection overruled Exception noted deposition precluded in both trials
Costs incurred by defendant in connection with the first trial of this action as taxed by the Clerk of the Court and as reviewed and modified by Judge Palmieri*	$6,601.08	
II. COSTS INCURRED IN CONNECTION WITH AN APPEAL BY PLAINTIFF FROM THE JUDGMENT ENTERED ON JULY 28, 1959 DISMISSING THE COMPLAINT		
A. Cost of printing 50 copies of Appellee's Brief and Appendix in connection with the Appeal	~~1,799.07~~	Objection sustained Exception noted not incurred in District Court
B. Cost of printing a Petition for Rehearing of its decision reversing the July 28, 1959 judgment, addressed to the United States Court of Appeals for the Second Circuit	~~124.21~~	
C. Cost of printing a Petition for a Writ of Certiorari to the United States Supreme Court to review the decision of the United States Court of Appeals for the Second Circuit which vacated the judgment of July 28, 1959 and which remanded the case for a new trial	~~622.37~~	

* The costs incurred by defendant in connection with the first trial of this action, which took place in May 1959, were taxed by the Clerk of this Court on October 30, 1959. [A copy of the Bill of Costs as taxed by the Clerk is attached as Exhibit A]. On November 3, 1959 plaintiff made a motion to review the taxation of these costs. On December 10, 1959, Judge Palmieri (who presided at the first trial of this action) rendered an opinion which substantially affirmed the costs as taxed by the Clerk. [A copy of this opinion is attached as Exhibit B]. On February 9, 1960, Judge Palmieri further modified the Bill of Costs. [A copy of this opinion is attached as Exhibit C].

[fol. 40]

D. Cost of printing a Reply Brief in connection with a petition made by defendant for a Writ of Certiorari to the United States Supreme Court	~~110.00~~	Objection sustained exception noted not incurred in District Court
E. Fees for filing a Petition for a Writ of Certiorari	~~100.00~~	
F. Amount paid to plaintiff to reimburse plaintiff for his costs on this appeal	~~644.24~~	

III. Costs in Connection With Motion Made By Defendant to Require Plaintiff to Post Security for Costs in Connection With the Second Trial of This Action.

A. Stenographers' fees for transcribing the minutes of proceedings held on September 14, 1960 and October 11, 1960 in connection with a motion made by defendant for Security for Costs	~~107.60~~	Objection sustained portion requested by Court furnished by plaintiff not included in this transcript exception noted
B. Cost of printing 60 copies of a Brief and Appendix in opposition to an appeal to the United States Court of Appeals for the Second Circuit filed by plaintiff from an order of Judge Levet requiring plaintiff to post Security for Costs in connection with the new trial of this action	~~517.46~~	Objection sustained exception noted not incurred in District Court
C. Cost of printing 50 copies of a Petition for a Rehearing of the decision of the Circuit Court setting aside the order of Judge Levet	~~119.95~~	
D. Amount paid to plaintiff to reimburse plaintiff for his costs on this appeal	~~220.25~~	

[fol. 41]

IV. Costs in Connection with Second Trial of this Action in February 1961

A. Stenographers' fees for transcribing the minutes of proceedings held on September 26, 1960 in connection with plaintiff's motion for adjournment of the trial	~~2.00~~	Objection sustained not ordered or used by Court exception noted
B. Stenographers' fees for the minutes of an examination before trial of the plaintiff, Dr. Howard Farmer, conducted by defendant on October 14, 1960	138.75	Objection overruled exception noted order of Judge Ryan dated July 28, 1960
C. Expenses of Witness Dr. Robert C. Page		
Two days attendance at court	8.00	No objection
D. Expenses of Witness Dr. Richard L. Meiling:		
(1) One day attendance at court in connection with trial	4.00	
(2) Subsistence during period traveling to and from New York and during period of attendance at court (1 day)	8.00	Objection overruled exception noted witness present and testified
(3) Lowest cost first class passage by air, round trip, between Columbus, Ohio and New York	78.32	
E. Expenses of Witness Alice Neal, R. N.		
(1) One day attendance at court in connection with trial	4.00	
(2) One day traveling from Dover, Delaware to New York and return	4.00	No objection
(3) Subsistence during period traveling to and from Wilmington, Delaware and during period of attendance at court (2 days)	16.00	

[fol. 42]

(4) Lowest cost first class passage, round trip between Wilmington, Delaware and New York	24.20	No Objection
F. Expenses of Witness Elias Faddoul		
(1) One day attendance at court	4.00	Objection overruled witness present and testified except'n noted
(2) Four days traveling from Beirut, Lebanon to New York and return	16.00	
(3) Subsistence during attendance at court and during travel from Beirut, Lebanon and New York (5 days)	40.00	Objection overruled exception noted 163 F. Sup. 924
(4) Lowest cost first class passage, round trip between Beirut, Lebanon and New York	1,442.90	
G. Expenses of Witness Dr. Harold Lohnaas		
(1) One day attendance at court in connection with trial	4.00	
(2) Subsistence during attendance at court (1 day)	~~8.00~~	On consent
(3) Expenses of transportation for appearance at court from Tuxedo Park, New York and return (160 miles @ ~~24~~ cents a mile)	~~38.40~~	
8 cents	~~19.20~~ 12.80	
H. Expenses of Dr. Frank Born		
(1) Three days attendance at court	12.00	Objection to item H overruled exception noted witness present and testified
(2) Five days traveling from Dhahran, Saudi Arabia to New York and return	20.00	
(3) Eight days subsistence in connection with attendance at court and during travel between Dhahran, Saudi Arabia to New York	64.00	

[fol. 43]

(4) Lowest cost first class air passage, round trip, between Dhahran, Saudi Arabia and New York	1,639.50	Objection overruled exception noted 163 F. Sup. 924
I. Expenses of Witness Marjorie Catherine Swanson, R. N.		
(1) Two days attendance at court	8.00	Objection to item I overruled exception noted witness present and testified
(2) Two days traveling from Tacoma, Washington to New York and return	8.00	
(3) Subsistence in connection with appearance in court and in connection with traveling to and from New York (4 days)	32.00	Objection overruled exception noted 163 F. Sup. 924
(4) Lowest cost first class air passage between Tacoma, Washington and New York	380.67	
J. Stenographers' fees for minutes of the trial of this action held on March 20, 21, 22, 23, 24, 27, 28, 29, 1961	1,329.90	Objection overruled exception noted 163 F. Supp. 924; 116 F. Supp. 102
Total	$16,413.67	
~~adjusted total~~ ~~11~~ deduction	4,513.55	
adjusted total	$11,900.12	

Costs taxed

July 7, 1961 ~~Judgment~~ in favor of the defendant against plaintiff in sum of $11,900.12

HAROLD A. CHARLSON (G. E. S.)
Clerk

[fol. 44]

IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF CHESTER BORDEAU SWORN TO JUNE 30, 1961 IN SUPPORT OF BILL OF COSTS

State of New York,
County of New York, ss.:

Chester Bordeau, being duly sworn says:

I am an attorney associated with White & Case, attorneys for the defendant. I am in charge of the defense of the above action which resulted in a jury verdict for defendant which plaintiff has not appealed. The costs outlined in the Bill of Costs submitted herewith were necessarily incurred in connection with its defense.

I make this affidavit to explain more fully the nature of the various items of cost.

I. Costs in Connection With the First Trial

This action was tried before Judge Palmieri for almost two weeks in May 1959. When the jury failed to reach agreement, Judge Palmieri dismissed the complaint for insufficiency as a matter of law. In connection with the judgment entered dismissing the complaint, defendant taxed a bill of costs. This bill of costs was reviewed on a motion made by the plaintiff and considered by Judge Palmieri on two occasions. A copy of the Bill of Costs as modified by Judge Palmieri is attached to the instant Bill of Costs as Exhibit A; decisions of Judge Palmieri in connection with this Bill of Costs are attached as Exhibits B and C.

Having presided over the first trial Judge Palmieri thoroughly examined each item of cost claimed in terms of his own first hand knowledge and ruled that the costs as taxed were necessarily incurred and were allowable costs. It might also be noted that some of the items taxed as costs on the first trial are also costs of the second trial. For example the transcript of the proceedings of the first trial [fol. 45] ($1,812.30) was quoted on no less than 77 pages of the transcript of the second trial. Similarly the transcript

of examinations before trial ($695.75) were quoted on no less than 50 pages of the transcript of the second trial. Most interestingly, plaintiff's own attorney read from these transcripts on far more occasions than did defendant's attorneys. The reason was that most of the witnesses who testified were called by defendant and plaintiff's attorney's method of procedure was to attempt to impeach these witnesses by reading long excerpts from their prior testimony, given either at the first trial or at their examination before trial.

While these substantial costs were in fact costs of the second trial to an even greater extent than they were of the first trial; they are included under Item I of this Bill of Costs and, of course, are not repeated elsewhere in the Bill of Costs.

II. Costs in Connection with Plaintiff's Appeal

Defendant actually incurred the printing and other costs set forth in connection with plaintiff's appeal from the judgment dismissing the complaint. These costs were necessarily incurred by defendant in the defense of this action, which a jury eventually found to be without merit. Needless to say, defendant's actual expenses in connection with this appeal were greatly in excess of the costs here taxed.

III. Costs in Connection with Motion for Security for Costs

In order to protect itself from the possibility of plaintiff's being unable to reimburse defendant for costs defendant incurred in the event (as actually happened) a verdict was rendered in favor of defendant, defendant made a motion to require plaintiff to post security for costs. Judge Levet granted this motion and plaintiff appealed to the [fol. 46] Circuit Court which reversed Judge Levet's decision. The expenses in connection with this effort by defendant to get security for costs were necessarily incurred by defendant and should be refunded to it.

IV. Costs in Connection with the Second Trial

Items A and B pertain to stenographers' fees in connection with minutes of proceedings immediately preceding the second trial of this action. Defendant conducted an

examination before trial of plaintiff. Copies of the minutes of these proceedings were essential to the defense of this action and the cost of the minutes were necessarily incurred by defendant.

Items C, D, E, F, G, H and I pertain to expenses to various witnesses. This action involved sharply contested issues of fact, concerning which a number of people were direct witnesses. It was necessary for defendant to defend the charges made by plaintiff by calling persons to testify who had knowledge of the facts. The personal testimony of these witnesses was indispensable. Plaintiff's claims specifically involved persons named by plaintiff who were located in the Middle East. Defendant could not hope to refute these claims without calling these persons to testify.

One of the central issues of the case was whether plaintiff had the results of laboratory tests on a patient before proceeding with an operation. He had testified that he had obtained these results from Mr. Faddoul. Mr. Faddoul testified that he had not given plaintiff these results. It was necessary for defendant to call Mr. Faddoul to testify so that the jury could see Mr. Faddoul and appraise his credibility. Use of depositions would have been unsatisfactory on this central issue of this case.

Similarly Dr. Born and Nurse Swanson had first hand knowledge of the transactions in question and it was impor-[fol. 47] tant to the defense to present them in the courtroom for the jury to appraise their credibility.

Item J covers the expenses of transcripts of the trial in this case. This transcript was used by defendant throughout the trial. It was referred to in the record and before the jury on at least six occasions by counsel and to the best of my knowledge it was also referred to and used by the Court during the trial. In a case involving a number of sharply contested issues of fact on a trial lasting almost two weeks, an accurate transcript of what each witness has testified to is indispensable.

For the above reasons the costs set forth in the Bill of Costs were necessarily incurred by defendant in connection with the defense of this action and should be awarded to it.

The jury, after a trial commencing on March 20, 1961 and ending on March 29, 1961, found plaintiff's claims to be

without merit. The claims made by plaintiff were exceedingly serious in that they raised questions concerning defendant's general employment policy and whether defendant employed persons for term or at will. Plaintiff also made grave charges against defendant and its medical staff in that he claimed that he was discharged because he made honest diagnoses. He claimed that defendant wanted him to make dishonest diagnoses so that it could keep from its personnel the fact that a serious eye disease was allegedly being contracted by defendant's American personnel. In view of the charges made by plaintiff, it was necessary for defendant to make every effort to present the full facts to the jury which it did. Upon hearing defendant's witnesses and upon listening to the full facts, the jury found there was no merit to the claims made by plaintiff. Needless to say, the actual expenses incurred by defendant in connection with this groundless litigation were many, many times the amount requested in this Bill of Costs.

[fol. 48] The costs set forth in the Bill of Costs should be taxed in favor of defendant.

Chester Bordeau.

Sworn to before me this 30th day of June 1961.

Edna G. Watrous, Notary Public, State of New York, No. 24-9549550, Qualified in Nassau County, Certificate filed in New York County, Commission Expires March 30, 1962.

IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF CHESTER BORDEAU SWORN TO DECEMBER 11, 1961 IN OPPOSITION TO MOTION TO REVIEW TAXATION OF BILL OF COSTS

State of New York,
County of New York, ss.:

Chester Bordeau, being duly sworn, says:

I am an attorney associated with White & Case, attorneys for the defendant. I make this affidavit in opposition to plaintiff's motion to review the taxation of costs by the

Clerk of this Court on July 7, 1961. These costs were taxed in connection with a judgment entered in favor of defendant on a jury verdict from which plaintiff has not appealed.

The following outline of facts demonstrates that the bill of costs as taxed by the Clerk should be affirmed in all respects, except as noted on page 5 hereof with reference to the expenses of the witness Elias Faddoul.

[fol. 49] I. Costs of the First Trial

This case was tried twice. The first trial before Judge Palmieri in May 1959 lasted almost two weeks. After the jury failed to reach a verdict, Judge Palmieri dismissed the complaint for insufficiency on several legal grounds.

On October 27, 1959 defendant served a Notice of Taxation of a Bill of Costs and supporting affidavits (attached as Exhibit A) on plaintiff. On October 30, 1959 attorneys for both sides appeared before the Clerk of this Court and went over each item of the Bill of Costs. After thorough discussion, the Clerk allowed many of the items and disallowed others.

Plaintiff then made a motion to review the Taxation of Costs of the first trial by the Clerk. In support of this motion plaintiff submitted a lengthy affidavit. Defendant submitted affidavits in opposition. (Attached as exhibit B). Plaintiff submitted a reply affidavit. The motion was then exhaustively argued before Judge Palmieri who presided over the first trial. On December 10, 1959, Judge Palmieri rendered a decision granting the motion in part and denying it in part. A copy of his opinion and decision is attached as exhibit C.

Pursuant to this decision defendant submitted additional affidavits and exhibits and plaintiff submitted opposing affidavits. On February 9, 1960 Judge Palmieri rendered a second opinion and decision supplementing his earlier decision. (Copy attached as exhibit D).

After plaintiff appealed to the Court of Appeals with reference to the judgment dismissing the complaint and after that Court reversed the judgment and remanded this case for new trial, defendant moved to compel plaintiff to post a bond for security for costs. After a decision by

Judge Levet granting the motion and by Judge MacMahon dismissing the complaint for failure to post a bond, plain-
[fol. 50] tiff appealed to the Circuit Court. The Court of Appeals reversed the order of Judge MacMahon dismissing the action for failure to file the bond directed by Judge Levet and vacated the order requiring posting of a bond for costs. In speaking for the Court of Appeals, Judge Clark considered a number of factors pertaining to the propriety of dismissing the complaint for failure to post a security for costs. These included plaintiff's allegations that he did not have sufficient funds to post such a bond, that defendant had been dilatory in making an application for security for costs and that plaintiff had incurred expenses in the prosecution of this action. While it is true that Judge Clark stated *in dicta* that defendant had tried the case "expensively," the question of the propriety of the costs allowed by Judge Palmieri was not before the Court. The heavy expenses incurred by defendant in defense of this action were occasioned by the requirement on the part of defendant to meet a claim which the jury has found factually to be without foundation. The facts that were required to controvert the plaintiff's claim were required to be adduced by witnesses who were remote from the place of trial. It seems that the fact that this plaintiff has caused this defendant to incur such heavy expenses has no bearing on the taxability of the costs. No affidavits were presented to the Court of Appeals relating to the reasonableness or the necessity for the expenses allowed below as taxable costs. Such affidavits would have been irrelevant to the issue of whether plaintiff should post security for costs.

Plaintiff now seeks to reopen all of the questions which were argued before the Clerk of this Court and Judge Palmieri in connection with the taxing of costs of the first trial. Judge Palmieri who presided at the first trial is certainly the best qualified person for determining which of these costs were necessary to the defense of this action. For example, plaintiff seeks on this motion to challenge
[fol. 51] once again the transcript of certain pre-trial hearings. Whether these transcripts were necessary or not is a very difficult question for one who was not present at these

hearings and who does not know their scope. Judge Palmieri permitted these costs stating:

> "In view of the nature and extent of these conferences and the importance of the rulings which were entered, I am of the opinion that it was necessary to have a full record of the arguments, stipulations, and representations made by counsel."

This is merely an example of one of the many instances in which Judge Palmieri's first-hand knowledge of what transpired was invaluable to him in reviewing the taxation of costs of the first trial. Whether he erred in his rulings is a matter which should not be reviewed by another judge of this court.

For these reasons the Clerk of this Court was correct in awarding defendant the costs of the first trial as taxed by Judge Palmieri.

Eight pages of the affidavit submitted by plaintiff's attorney in support of the motion, pertain to the costs of the first trial.

II. Costs in Connection with the Second Trial

The following is an outline of the facts with reference to those items on the Bill of Costs to which plaintiff objects.

A. *Stenographers' fees for minutes of examination before trial of plaintiff on October 14, 1960* $138.75

This examination was conducted pursuant to an order of Judge Ryan. The purpose of this examination was to obtain relevant information with reference to plaintiff's [fol. 52] damages during the more than one year period since the first trial of this action. Plaintiff claimed damages of $160,000 (at the first trial he claimed approximately $60,000) which allegedly resulted from his wrongful discharge by defendant. To defend properly this claim of continuing damage it was necessary for defendant to explore thoroughly plaintiff's efforts to earn money.

B. *Expenses of witness Dr. Richard L. Meiling* $90.32

One of the crucial factual issues was whether plaintiff had conducted an operation under general anesthesia without having the results of a blood test and urinalysis. Defendant contended that such results were required not only by a specific rule of its hospital but were also required by commonly accepted standards of proper medical procedure. Further defendant contended that plaintiff was aware of this generally accepted standard. Plaintiff contended he was unaware of this. Dr. Meiling is Director of a Medical Center in Ohio where Dr. Farmer was a resident in ophthalmology. Dr. Meiling testified that results of such an examination were required by a standard rule of practice in the medical profession and that there was such a rule in that hospital at the time Dr. Farmer was resident there and that Dr. Farmer was required to receipt for a copy of this rule. As such, his testimony was important and necessary to the defense of this action. There is no dispute that the amount taxed includes the lowest cost first class round trip air passage from Ohio to New York or that defendant paid it.

C. *Expenses of witness Elias Faddoul* $864.00

In the bill of costs taxed by the Clerk of this court on July 7, 1961 the expenses of Mr. Faddoul were given as $1,442.90. This was in accord with information which I [fol. 53] had received from our client in connection with expenses incurred. With respect to the motion made by plaintiff to review the bill of costs taxed by the Clerk of the court on July 7, 1961 I asked our client to verify that each expense had been paid by it. My attention has been called to the fact that the actual expense paid by defendant in connection with Mr. Faddoul's trip from Beirut, Lebanon to the United States on the second trial amounted to $864.00 as indicated by the affidavit of Mr. D. M. McLeod, Assistant Comptroller of defendant, whose affidavit is submitted herewith.

Mr. Faddoul was without any exaggeration the most important witness called by the defense. At the first trial of this action, plaintiff testified for the first time that he had

received the results of these laboratory examinations prior to performing this operation and that he had been given these results by Mr. Faddoul. At his examination before trial, plaintiff had stated that he had not had the results of these tests prior to the operation. At the second trial, plaintiff suggested that he *might* have received reports from Mr. Faddoul but wasn't certain. Witness Faddoul testified that he had not given plaintiff the results of these tests as plaintiff had claimed at the first trial. Mr. Faddoul was not employed by the defendant and was working in Beirut, Lebanon at the time of the second trial.

In my opinion as trial counsel, his presence in the courtroom was indispensable to the jury in determining who was telling the truth, Faddoul or plaintiff. In my opinion there was no substitute for the personal testimony of this vital witness on the central issue in this case. There is no dispute that the amount taxed includes the lowest cost first class round trip air passage from Beirut, Lebanon to New York or that defendant paid it.

[fol. 54]

D. *Expenses of witness Dr. Frank Born* $1,735.50

Dr. Born was Assistant Medical Director of defendant at the time plaintiff was discharged and was present at the time plaintiff was discharged and witnessed the operation performed by plaintiff. He testified that at the time of his discharge Dr. Farmer admitted he had performed the operation without obtaining the laboratory work and did so, because he did not think it was necessary. (See p. 524 of the record.) This was highly relevant and important testimony for a jury to hear in order for them to make their determination of whether Dr. Farmer was truthful in stating that he had received the results of these tests prior to conducting this operation. Once again in my judgment as trial counsel, there was no substitute for the personal testimony of Dr. Born with reference to this most important admission with reference to the central issue of the case. If defendant had not called Dr. Born to testify, it would have subjected itself to a charge by the Court with reference to adverse inferences to be drawn from not call-

ing a witness under its control who possessed information bearing on a material issue. The importance of Dr. Born's testimony is apparent from the fact that plaintiff saw fit to conduct over 50 pages of cross-examination of Dr. Born. There is no dispute that the amount taxed includes the lowest cost first class round trip air passage from Saudi Arabia to New York or that defendant paid it.

E. *Expenses of witness Marjorie Catherine Swanson, R. N.* $428.67

This witness was the anesthetist assigned to the operation performed by plaintiff. She testified that she told plaintiff that she would not act as anesthetist since the results of the laboratory tests had not been received. She [fol. 55] testified at that time she said this, Dr. Farmer proceeded to administer the anesthesia himself and made no comment that he had in fact already received the results of these tests. (See pp. 581-584 of the record.) Nurse Swanson was cross-examined at length by plaintiff. (See pp. 584-624 of the record.) Her personal presence was vital to a determination of the central factual issue before the jury. There is no dispute that the amount taxed includes the lowest cost first class round trip air passage from Washington to New York or that defendant paid it.

F. *Stenographers' fees of the minutes of this trial* $1,329.90

There were numerous direct factual contradictions in the testimony of the various witnesses in this action. The two major issues in this case were what the term of plaintiff's employment contract was and whether he was justifiably discharged. The term of plaintiff's contract was alleged by plaintiff to have been for as long as defendant maintained oil wells in Saudi Arabia. He testified that he was promised employment for this length of time in a conversation with defendant's employee. Each time plaintiff testified with reference to this promise his testimony varied. The exact phraseology of this promise was exceedingly important inasmuch as it was possible that the Statute of Frauds might have applied to it. The phrase-

ology was also important in connection with cross-examination of plaintiff in testing his credibility and memory. The exact words used by plaintiff as transcribed by the court reporter were thus indispensable. The second issue pertained to the reason for plaintiff's discharge. The vital issue in this connection was whether plaintiff in fact had received the results of the laboratory tests prior to commencing the operation. Plaintiff's testimony on different [fol. 56] occasions in this respect was directly contradictory. It was vitally important for plaintiff's exact words with reference to whether he had received these tests to be transcribed. It was important to have this record so that the jury could have the full and accurate facts upon which to come to a verdict. There were other factual issues raised which could be resolved only by having available the accurate record of the testimony. There were many factual questions to be resolved with respect to what transpired before the action was commenced without any additional disputes about what had been said at this trial. The only manner in which such disputes could be prevented or resolved was to have an accurate transcript of the trial. In my opinion the trial would have become extremely confused had such a transcript not been secured. The mere presence of such a transcript prevented such issues from arising.

Counsel for the defendant used this transcript constantly throughout the trial. It was referred to in the record and before the jury on at least six occasions by counsel. To the best of my recollection it was also referred to and used by the Court during the trial.

At the first trial of this action the following transpired:

"'Mr. Bordeau: He did not object.

"'Mr. Nulman [trial counsel at both trials]: I did object.

"'Mr. Bordeau: He did not object.

"'The Court: Let's get that right away. When did you put it in?

"'Mr. Bordeau: On the cross-examination of Dr. Farmer.

"'Mr. Nulman: I don't remember—I just—

"'The Court: You have just made a statement that he was permitted to do something over your objection.

[fol. 57] I am going to stop this right now. You have been making statements all along in this case that haven't been in accord with my recollection, and I want to stop it right now, if I can, by reference to the record.'" (reads record) (1249-1252)

In addition, at the first trial, the jury actually requested whole pages from the transcript of the testimony to assist them in their deliberations. At the first trial, they asked to see plaintiff's pre-trial testimony and trial testimony with reference to the receipt of the laboratory reports by plaintiff.

Defendant, therefore, had reason to anticipate similar confusion concerning the rulings of the Court and possible use of the transcript by the jury.

Under the circumstances, I believe it would have been derelict not to have obtained copies of this transcript as the second trial progressed. The cost of this transcript was necessarily obtained for use in this case.

For the above reasons, plaintiff's motion should be denied in all respects.

Chester Bordeau.

Sworn to before me this 11th day of December, 1961.

Corinne S. Hohfeler, Notary Public, State of New York, No. 52-1830200, Qual. in Suffolk Co., Certificate filed in New York County, Term Expires March 30, 1963.

[fol. 58]

IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF D. M. McLEOD, SWORN TO DECEMBER 11, 1961 IN OPPOSITION TO MOTION TO REVIEW TAXATION OF BILL OF COSTS

State of New York,
County of New York, ss.:

D. M. McLeod, being duly sworn, deposes and says

That he is an Assistant Comptroller of the Arabian American Oil Company, and as such is familiar with the

expenditures made by the Arabian American Oil Company in connection with the two trials of this action, the first having taken place before The Honorable Edward L. Palmieri, United States District Judge, on May 11, 1959 through May 21, 1959, and the second having taken place before The Honorable Edward Weinfeld, United States District Judge, on March 20, 1961 through March 29, 1961.

Your deponent has reviewed the Bill of Costs as taxed by the Clerk of this Court on July 7, 1961 in the amount of $11,900.12.

With the exception as hereinafter noted your deponent certifies that the items as they appear on the Bill of Costs were actually expended by the Arabian American Oil Company. Upon the review of this Bill of Costs as taxed by the Clerk on July 7, 1961 your deponent found that the first class air fare from Beirut, Lebanon to New York and return to Beirut, Lebanon is $1,442.90; however, in reviewing the records to be sure that each item as taxed was paid for by the Arabian American Oil Company, your deponent found that Mr. Faddoul travelled economy class, and that his round trip air fare from Beirut, Lebanon to New York and [fol. 59] return to Beirut, Lebanon was $864.00 which the Arabian American Oil Company paid.

D. M. McLeod.

Sworn to and subscribed before me this 11th day of December, 1961.

Delia H. Morgan, Notary Public.

Delia H. Morgan, State of New York, No. 313012-30, Qualified in New York County, Cert. filed in Queens County, Commission Expires March 30, 1962.

IN UNITED STATES DISTRICT COURT

Appearances:

William V. Homans, Esq., 122 East 42nd Street, New York, New York, Attorney for Plaintiff.

White & Case, Esqs., 14 Wall Street, New York, New York, Attorneys for Defendant.

Chester Bordeau, Esq., William D. Conwell, Esq., Of Counsel.

OPINION—September 11, 1962

EDWARD WEINFELD, D.J.

The plaintiff, who was unsuccessful in his action for breach of contract of employment, seeks to review the taxation of costs by the Clerk of the Court which have been allowed in the sum of $11,900.12.

[fol. 60] There have been two trials, each to a jury. The first resulted in a disagreement following which the Trial Judge granted the defendant's motion for a directed verdict as to which he had reserved decision, and thereupon judgment was entered in favor of the defendant.[1] Upon appeal this judgment was reversed and a new trial ordered.[2] Upon the second trial before this Court the jury returned a verdict in the defendant's favor.

Plaintiff, a physician who specialized in ophthalmology and practiced in Texas, alleged that he had been engaged by the defendant to head up the ophthalmology service of its hospital in Saudi Arabia for as long as the defendant continued to operate its oil wells there; that after he had entered upon the performance of his duties in Saudi Arabia, he had been wrongfully discharged. Although the issues presented by the plaintiff's claim were, as this Court instructed the jury, "comparatively simple,"[3] costs have

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[1] *Farmer* v. *Arabian Am. Oil Co.*, 176 F. Supp. 45 (S. D. N. Y. 1959).

[2] 277 F. 2d 46 (2d Cir.), cert. denied, 364 U. S. 824 (1960).

[3] These were: (1) was there an employment agreement as alleged by plaintiff; (2) did defendant's representative have authority to commit it thereto; and (3) if so, was plaintiff discharged for cause?

been taxed in the staggering sum of $11,900.12. The Court is persuaded that a substantial number of these costs, while they may well have been incurred in serving the convenience of the defendant and its attorneys, cannot be justified as necessary in resisting the plaintiff's claim.

Undoubtedly, parties to a litigation may fashion it according to their purse and indulge themselves and their attorneys, but they may not foist their extravagances upon their unsuccessful adversaries. To sanction such a policy may result not only in harassing a litigant, but may even deprive him of his day in court, particularly where, as in [fol. 61] the instant case, there is great disparity in the financial resources of the parties. Fear of imposition of astronomical costs should not be a deterrent against the assertion of legitimate disputes;[4] nor should one who in good faith brings an action be penalized because he has failed to carry his burden of persuasion.[5] While this defendant, as the Court of Appeals observed, " • • • with its rich resources may well wish to try the case expensively • • • "[6] it, as the successful litigant, is entitled to tax costs only in amounts specified in applicable statutes and, where not expressly specified, the allowable costs must not only be reasonable but necessary in resisting the plaintiff's claim.

Rule 54(d) of the Federal Rules of Civil Procedure, which provides that costs "shall be allowed as of course to the prevailing party unless the court otherwise directs," vests discretion in the court in passing upon the necessity and the reasonableness of the costs.[7] The policy of the Federal Courts has been to keep litigation costs down—as particularly enunciated in Rule 1 of the Federal Rules of

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[4] *Emerson* v. *National Cylinder Gas Co.*, 147 F. Supp. 543, 545 (D. Mass. 1957), aff'd, 251 F. 2d 152 (1st Cir. 1958).

[5] See *Andresen* v. *Clear Ridge Aviation, Inc.*, 9 F. R. D. 50 (D. Neb. 1949). Cf. *Chicago Sugar Co.* v. *American Sugar Refining Co.*, 176 F. 2d 1, 11 (7th Cir. 1949), cert. denied, 338 U. S. 948 (1950).

[6] *Farmer* v. *Arabian Am. Oil Co.*, 285 F. 2d 720, 722 (2d Cir. 1960).

[7] *Harris* v. *Twentieth Century-Fox Film Corp.*, 139 F. 2d 571 (2d Cir. 1943).

Civil Procedure, " * * * to secure the just, speedy, and inexpensive determination of every action." The court's discretion should be exercised in conformity with that policy to avoid " * * * making the federal court a court only for rich litigants."[8]

[fol. 62] The plaintiff first challenges the allowance by the Clerk in a lump sum of $6,601.08, the full bill of costs as taxed after the first trial. Plaintiff seeks disallowance thereof upon the ground that the prevailing party is only entitled to tax costs of that trial in which he was ultimately successful. I do not agree. A prevailing party is entitled to tax all costs reasonably and necessarily incurred in either the prosecution or defense of a suit, and if more than one trial is required before a final result is achieved, the measure of taxable costs is not proscribed by that trial in which he finally prevailed.

Neither do I agree with the defendant's position that since the Presiding Judge at the first trial reviewed the taxation of costs, the plaintiff may not now challenge them. The reversal by the Court of Appeals of the first judgment in the defendant's favor necessarily resulted in the vacatur of the entire judgment including the costs which were a component part thereof. In fact, upon reversal of that judgment, the bill of costs which had been allowed upon review was formally vacated by an order entered in this Court. Accordingly, upon conclusion of the second trial the defendant as the prevailing party had the right to tax costs anew, whether claimed in connection with the first or second trial; and the plaintiff as the losing party equally had the right to have them reviewed *de novo*. Since the second trial was held before this Court it is in a position, against the background of both trials, to make a determination as to whether the various items were properly allowed by the Clerk either as mandated under statute or as reasonable and necessary.

Parenthetically, it should be noted that the Court of Appeals, in reversing an order directing the plaintiff herein to furnish security for costs, commented with respect to

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[8] *Farmer* v. *Arabian Am. Oil Co.*, 285 F. 2d 720, 722 (2d Cir. 1960).

travel expenses of witnesses, daily transcripts of the first trial and stenographic fees for pretrial hearings and examination of witnesses that there was no convincing showing [fol. 63] of their necessity.[9] While concededly the Court of Appeals' critical reference is *obiter dictum*, it is clear that it entertained serious doubt as to the allowance of those items.

The principal items attacked are transportation charges for bringing employees of the defendant or its former employees, either from Saudi Arabia or from distances within the United States beyond the subpoena power of the Court to testify at the trials. Three witnesses were brought here from Saudi Arabia for the first trial. One travelled on a private carrier and his transportation and expenses were taxed at $1,531.50. The other two witnesses travelled in the defendant's privately operated plane which had vacant seats to accommodate them. Although it was acknowledged there would have been unoccupied seats had the witnesses not been assigned to the flight, the defendant was allowed to tax their travel fare on the basis of a bookkeeping entry which allocated the cost of the seats in accordance with a computation of the yearly cost to the defendant in the operation of its airplanes. The stark fact remains that if the seats had not been used by the two witnesses, the defendant's annual expense for plane operation would have remained precisely the same. While the computation of the average cost per passenger may serve some statistical purpose of the defendant, it affords no justification for charging this theoretical figure to the plaintiff. At the second trial the defendant did not use its own plane but transported all three witnesses by commercial air line.

The basic issue remains—whether under all the circumstances it was necessary and reasonable to bring the witnesses from Saudi Arabia and other distant points to testify [fol. 64] at the trials. Concededly, it is preferable to have

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[9] *Farmer* v. *Arabian Am. Oil Co.*, 285 F. 2d 720 (2d Cir. 1960). This was an appeal by plaintiff from an order which dismissed his complaint for failure to post security for costs, which order was entered after the reversal by the Court of Appeals of the judgment dismissing the complaint for legal insufficiency.

"live witnesses" appear before the trier of the fact than to offer their testimony by way of deposition or interrogatories;[10] but countervailing considerations including the element of expense cannot be ignored. The cost of procuring the personal attendance of witnesses may be prohibitive or so burdensome or relatively disproportionate to the sums involved in the litigation as to require alternatives.[11] In the instant case the defendant had taken the plaintiff's pretrial deposition and so was aware of his contentions in support of his claim. It knew the witnesses it would rely upon to rebut his contentions. The testimony of any witness beyond the subpoena power of the Court could have been obtained by way of deposition, open commission, written interrogatories or letters rogatory. Upon an appropriate motion, the means of obtaining the testimony of the witness would have rested with the Court which, in its discretion, could have imposed conditions with respect to which party initially was to bear the expense and provided for its ultimate taxation in favor of the prevailing party.[12]

The defendant, instead of availing itself of pretrial procedures to obtain the testimony of such witnesses, decided to await the trial and to bring them here to testify in person. It was this decision which in large measure accounts for the huge bill of costs. Under all the circumstances the Court is of the view that these unusual expenses, entirely [fol. 65] disproportionate to the sum involved in this action, are unreasonable and should not be allowed.[13] In the exer-

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[10] *Bank of America* v. *Loew's Int'l Corp.*, 163 F. Supp. 924, 929 (S. D. N. Y. 1958). Cf. *Arnstern* v. *Porter*, 154 F. 2d 464, 469-70 (2d Cir. 1946); *Morrison Export Co.* v. *Goldstone*, 12 F. R. D. 258 (S. D. N. Y. 1952); *Lago Oil & Transport Co* v. *United States*, 97 F. Supp. 438 (S. D. N. Y. 1951); *Worth* v. *Trans World Films, Inc.*, 11 F. R. D. 197 (S. D. N. Y. 1951); *V. O. Machinoimport* v. *Clark Equipment Co.*, 11 F. R. D. 55 (S. D. N. Y. 1951).

[11] Cf. *Taejon Bristle Mfg. Co.* v. *Omnex Corp.*, 13 F. R. D. 448 (S. D. N. Y. 1953).

[12] Fed. R. Civ. P. 30(b). See *Branyan* v. *Koninklijke Luchtvaart Maatschappij*, 13 F. R. D. 425 (S. D. N. Y. 1953).

[13] Cf. *Taejon Bristle Mfg. Co.* v. *Omnex Corp.*, 13 F. R. D. 448 (S. D. N. Y. 1953).

cise of discretion, taxation of costs for those witnesses who appeared and testified at either trial will be limited to *per diem* fees for attendance and travel expenses not to exceed one hundred miles to and from the Court House. Thus, there is no occasion to deal with the question of whether in a proper case the Federal Rules of Civil Procedure[14] and the Judicial Code[15] authorize the taxation of transportation expenses of witnesses who travel to the place of trial more than one hundred miles or a further distance within the district.[16]

Another major item of expense is for daily transcripts of the minutes of both trials. This Court did not request the trial minutes. During the progress of the trial it made its own notes and abstract of the testimony of the various witnesses. There was nothing unusual or complicated about the issues presented under the pleadings. Undoubtedly it serves the convenience of counsel to have a witness' testimony as the trial proceeds, but absent a showing of necessity therefor, these may not be charged to an opposing side.[17] However much it might have made trial counsel's [fol. 66] labors, or even the Court's, easier to have the overnight transcripts, this does not establish that they are indispensable for proper cross examination as now urged. An entirely different situation is presented in the instance of a complicated and extended trial where lawyers are required to submit briefs and proposed findings.

The argument advanced that the jury requested the reading of portions of the testimony does not support the

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[14] Fed. R. Civ. P. 45(e), 54(d).

[15] 28 U. S. C. §§1821, 1920(3) (1958).

[16] *Compare Maresco* v. *Flota Merchante Grancolombiana*, 167 F. Supp. 845 (E. D. N. Y. 1958), *and Bank of America* v. *Loew's Int'l Corp.*, 163 F. Supp. 924 (S. D. N. Y. 1958), *with Spiritwood Grain Co.* v. *Northern Pac. Ry.*, 179 F. 2d 338, 344 (8th Cir. 1950), *Ryan* v. *Arabian Am. Oil Co.*, 18 F. R. D. 206 (S. D. N. Y. 1955) (dictum), *and Perlman* v. *Feldmann*, 116 F. Supp. 102, 115 (D. Conn. 1953). See also *Ludvigsen* v. *Commercial Stevedoring Co.*, 228 F. 2d 707 (2d Cir.), cert. denied, 350 U. S. 1014 (1956).

[17] 28 U. S. C. §1920(2) permits the taxation of "fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case."

defendant's claim for repayment for the daily transcript. It is fairly common experience that a jury during its deliberation asks that a particular witness' testimony be read; in such a situation the official court reporter reads from his original notes. Of course, if a transcript is available, the reporter may use it, but some courts have required that he always read from his original notes. There has been no showing to justify the charge for the transcript of the trials and they, too, are disallowed.

Another item for a stenographer's minutes points up the free and easy approach adopted by the defendant in incurring expense. In the first bill of costs an item allowed was for a verbatim transcription of counsel's oral argument on the defendant's pretrial motion for summary judgment. This Court, before whom the motion was argued, neither requested nor indicated that it was interested in obtaining a copy of counsel's oral argument. Yet the transcript thereof was ordered by defendant. This item, as well as other charges for minutes of legal arguments at various pretrial hearings on motions, are disallowed.[18]

The Court also disallows the cost for photostats of exhibits which were either received in evidence or marked for identification. The originals were available and produced in court and there is no showing of necessity for the photostats other than the convenience of counsel.

[fol. 67] With respect to the pretrial deposition of plaintiff, a question has arisen as to the rate per page charged. The taxation of this item shall not exceed the authorized rate per page for a single copy.[19]

In sum, the following are disallowed:

Items 2 (except minutes of 2/18/58 and 5/6/59 are allowed), 3, 4, 5, 6, 7, 10 and 12 contained in the first bill of costs, and I, IV(D), (E), (F), (H), (I) and (J) in the

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[18] Cf. *Perlman* v. *Feldmann*, 116 F. Supp. 102, 112 (D. Conn. 1953).

[19] Order of the United States District Court for the Southern District of New York dated December 27, 1948 and filed December 28, 1948, as amended by an order dated and filed April 7, 1958, based upon the recommendation of the Judicial Conference of the United States.

second bill of costs (except that mileage and expenses of witnesses at both trials are allowed as limited above).

Dated: New York, N. Y.
September 11, 1962.

Edward Weinfeld, United States District Judge.

[fol. 68]

IN UNITED STATES DISTRICT COURT

MEMORANDUM

EDWARD WEINFELD, D.J.

The attached communication, to which no reply has been received from defense counsel, is treated as an application for resettlement of the Court's order dated September 11, 1962.

Counsel is correct in that the Court intended to disallow the cost of the minutes for the hearing of 2/18/58, as the discussion on page 13 indicates. The Court intended to allow the cost of the minutes of the examination before trial of the plaintiff, including that of 10/8/56.

The order is modified to the extent of disallowing the cost of the minutes of 2/18/58, and allowing the cost of the minutes of 10/8/56 limited to authorized rates.

Dated: New York, N. Y.
September 28, 1962.

Edward Weinfeld, United States District Judge.

[fol. 69]

IN UNITED STATES DISTRICT COURT

STATEMENT SHOWING COSTS ALLOWED BY JUDGE WEINFELD

Statement showing corrected items on the bills of costs in the above-entitled action pursuant to Judge Weinfeld's rulings in opinion #28,134 filed September 11, 1962 and memorandum dated September 28, 1962:

Costs for witnesses who appeared and testified at either trial were limited to *per diem* fees for attendance and travel expenses not to exceed one hundred miles to and from the Court House. (Page 11, Opinion #28,134).

Costs for transcript of the trials disallowed. (Page 13, Opinion #28,134).

Costs for transcripts of arguments on motions disallowed. (Pages 13 & 14, Opinion #28,134).

Costs of photostats of exhibits disallowed. (Page 14, Opinion #28,134).

ITEMS AND AMOUNTS ALLOWED ON FIRST BILL OF COSTS.

1.	Attorneys' docket fee		$ 20.00
2.	Stenographers' fees for minutes of hearings and examinations before trial held on:		
	10-8-56—95 pages @ 65¢	$61.75	
	5-6-59—22 pages @ 65¢	14.30	76.05
	(Cost of pretrial deposition of plaintiff not to exceed authorized rate for single copy (page 14, Opinion #28,134).		
	ITEM 5—WITNESS FADDOUL:		
	2 days' attendance	$ 8.00	
	2 days' subsistence	16.00	
	200 miles @ 8¢/mile	16.00	40.00
	Sub-Total		$136.05
	Amount brought forward		$136.05
	ITEM 6—WITNESS PAGE:		
	8 days' attendance	$32.00	
	8 days' subsistence	64.00	
	200 miles @ 8¢/mile	16.00	$112.00
	ITEM 7—WITNESS SWANSON:		
	8 days' attendance	$32.00	
	8 days' subsistence	64.00	
	200 miles @ 8¢/mile	16.00	112.00

[fol. 70]

ITEM 10—WITNESS NEAL:		
2 days' attendance	$ 8.00	
2 days' subsistence	16.00	
200 miles @ 8¢/mile	16.00	40.00
ITEM 12—WITNESS MEILING:		
1 days' attendance	$ 4.00	
200 miles @ 8¢/mile	16.00	20.00
TOTAL COSTS, FIRST BILL OF COSTS, AS AMENDED		$420.05
ITEMS AND AMOUNTS ALLOWED ON SECOND BILL OF COSTS		
I—Amended amount, first bill of costs		$420.05
IV(D)—WITNESS MEILING:		
1 days' attendance	$ 4.00	
1 days' subsistence	8.00	
200 miles @ 8¢/mile	16.00	28.00
IV(E)—WITNESS NEAL:		
1 days' attendance	$ 4.00	
200 miles @ 8¢/mile	16.00	20.00
IV(F)—WITNESS FADDOUL:		
1 days' attendance	$ 4.00	
1 days' subsistence	8.00	
200 miles @ 8¢/mile	16.00	28.00
IV(H)—WITNESS BORN:		
3 days' attendance	$12.00	
3 days' subsistence	24.00	
200 miles @ 8¢/mile	16.00	52.00
IV(I)—WITNESS SWANSON:		
2 days' attendance	$ 8.00	
2 days' subsistence	16.00	
200 miles @ 8¢/mile	16.00	40.00
TOTAL COSTS, SECOND BILL OF COSTS, AS AMENDED		$588.05

[fol. 71]

IN UNITED STATES DISTRICT COURT

CORRECTED STATEMENT SHOWING ITEMS ALLOWED BY JUDGE WEINFELD

Corrected statement showing items of defendant's costs allowed and amended pursuant to Judge Weinfeld's rulings in Opinion #28,134 filed September 11, 1962 and memorandum dated September 28, 1962.

Costs for witnesses who appeared and testified at either trial were limited to per diem fees for attendance and travel expenses not to exceed one hundred miles to and from the Courthouse. (Page 11 of the opinion).

Costs for transcript of the trials disallowed. (Page 13 of the opinion).

Costs for transcripts of arguments on motions disallowed. (Pages 13 & 14 of the opinion).

Costs of photostats of exhibits disallowed. (Page 14 of the opinion).

ITEMS AND AMOUNTS ALLOWED ON FIRST BILL OF COSTS

1.	Attorneys' docket fee		$ 20.00
2.	Stenographers' fee for minutes of hearings and examinations before trial:		
	10-8-56—95 pages @ 65¢	$61.75	
	5-6-59—22 pages @ 65¢	14.30	76.05
3 & 4 disallowed in entirety.			
5.	WITNESS FADOUL:		
	2 days' attendance	$ 8.00	
	2 days' subsistence	16.00	
	200 miles @ 8¢/mile	16.00	40.00
6.	WITNESS PAGE:		
	8 days' attendance	$32.00	
	8 days' subsistence	64.00	
	200 miles @ 8¢/mile	16.00	112.00

[fol. 72]

7. WITNESS SWANSON:		
8 days' attendance	$32.00	
8 days' subsistence	64.00	
200 miles @ 8¢/mile	16.00	112.00
Amount carried forward		$360.05
Amount brought forward		$360.05
8. WITNESS BORN:		
6 days' attendance	$24.00	24.00
9. WITNESS LOHNAAS:		
4 days' attendance at trial	16.00	
1 days' attendance at court for deposition	4.00	
300 miles @ 8¢/mile (100 mile round trip on each of 3 days)	24.00	44.00
10. WITNESS NEAL:		
2 days' attendance	8.00	
2 days' subsistence	16.00	
200 miles @ 8¢/mile	16.00	40.00
11. WITNESS HEINZ:		
1 day's attendance	4.00	4.00
12. WITNESS MEILING:		
1 day's attendance	4.00	
200 miles @ 8¢/mile	16.00	20.00
13. WITNESS BINETTI:		
1 day's attendance	4.00	4.00
TOTAL COSTS, FIRST BILL OF COSTS, AS AMENDED		$496.05

ITEMS AND AMOUNTS ALLOWED ON SECOND BILL OF COSTS

I. Amended amount, first bill of costs		$496.05
II & III—Objections sustained at time of taxation.		
IV(A)—Objection sustained at time of taxation.		
IV(B)—Examination before trial of plaintiff, conducted by defendant on Oct. 14, 1960		138.75
IV(C)—WITNESS PAGE:		
2 days attendance		8.00
IV(D)—WITNESS MEILING:		
1 day's attendance	$ 4.00	
1 day's subsistence	8.00	
200 miles @ 8¢/mile	16.00	28.00

[fol. 73]

IV(E)—Witness Neal:		
1 day's attendance	$ 4.00	
200 miles @ 8¢/mile	16.00	20.00
IV(F)—Witness Fadoul:		
1 day's attendance	$ 4.00	
1 day's subsistence	8.00	
200 miles @ 8¢/mile	16.00	28.00
IV(G)—Witness Lohnas:		
1 day's attendance	$ 8.00	
160 miles @ 8¢/mile	12.80	20.80
Amount carried forward		$739.60
Amount brought forward		$739.60
IV(H)—Witness Born:		
3 days' attendance	$12.00	
3 days' subsistence	24.00	
200 miles @ 8¢/mile	16.00	52.00
IV(I)—Witness Swanson:		
2 days' attendance	$ 8.00	
2 days' subsistence	16.00	
200 miles @ 8¢/mile	16.00	40.00
IV(J)—Disallowed.		
Total Costs, 2nd Bill of Costs, as Amended		$831.60

Amount of $588.05 in judgment #64,313 corrected to show amount in sum of $831.60.

Herbert A. Charlson,
Clerk.

by: Gilbert E. Surdez
Deputy Clerk.

[fol. 74]

IN UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 240—October Term, 1962

Argued February 1, 1963.

Submitted to the *in banc* court March 18, 1963.

Docket No. 27893

HOWARD FARMER, Plaintiff-Appellee,

v.

ARABIAN AMERICAN OIL COMPANY, Defendant-Appellant.

Before: Lumbard, Chief Judge, Clark, Waterman, Moore, Friendly, Smith, Kaufman, Hays and Marshall, Circuit Judges.

Appeal by defendant from taxation of costs in its favor in civil action in the United States District Court for the Southern District of New York, Edward Weinfeld, *J.*, 31 F. R. D. 191. Affirmed in part and reversed in part.

Kalman I. Nulman, New York, N. Y. (William V. Homans, New York, N. Y., on the brief), for plaintiff-appellee.

[fol. 75] Chester Bordeau, New York, N. Y. (White & Case and William D. Conwell, New York, N. Y., on the brief), for defendant-appellant.

OPINION—November 6, 1963

LUMBARD, *Chief Judge* (with whom Judges MOORE, FRIENDLY, KAUFMAN and MARSHALL concur):

This appeal presents a question of importance in the administration of civil litigation, namely the power of a district judge to tax costs for the transportation of witnesses to trial from places without the judicial district

and more than 100 miles distant from the place of trial. We hold that costs for such travel may be allowed and in the light of that holding we examine the rulings with respect thereto made by the district judges at the two trials of Farmer's suit for an alleged breach of his contract of employment.

Howard Farmer instituted this litigation on May 24, 1956, in the Supreme Court, New York County, against the Arabian American Oil Company (Aramco). Aramco removed the cause to the United States District Court for the Southern District of New York, there being diversity of citizenship. A trial was had before Judge Palmieri and a jury which terminated in a jury disagreement. Thereafter, Aramco's motion for a directed verdict was granted, 176 F. Supp. 45 (1959), but this determination we reversed, 277 F. 2d 46, cert. denied, 364 U. S. 824 (1960), necessitating a second trial. Farmer failed to comply with an order directing him to post security for costs, and the action was dismissed. We again reversed, holding that the order constituted an abuse of discretion, as it effectively precluded the plaintiff from prosecuting his action because of the expense of procuring the bond, 285 F. 2d 720 (1960). A second jury trial, before Judge Weinfeld, resulted in a verdict for the defendant. The Clerk taxed costs of $11,900.12 which on Farmer's motion were reduced by Judge [fol. 76] Weinfeld to $831.60, and from this order Aramco appeals. After the appeal was heard by a panel consisting of Judges Lumbard, Smith and Hays, the active judges of this court agreed that the appeal should be considered *in banc*.

Some earlier decisions cast doubt on the appealability of a judgment solely for costs. See *Newton* v. *Consolidated Gas Co.*, 265 U. S. 78 (1924); *The James McWilliams*, 49 F. 2d 1026 (2 Cir. 1931); *Walker* v. *Lee*, 71 F. 2d 622 (9 Cir. 1934). However, Rule 54(d) of the Federal Rules of Civil Procedure now governs the granting of costs. It states: "Except when an express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs * * *." The effect of this pro-

vision, combined with 28 U. S. C. §1920,[1] is to make the right to statutory costs subject to judicial discretion. Within the careful statutory scheme, no hint of intent to create an element of uncontrolled discretion can be found, nor is one lightly to be implied. Furthermore, it is unquestionably true that the portion of the judgment relating to costs may be reviewed on appeal, for abuse of that discretion, if other issues are also raised. See, e.g., *Chemical Bank & Trust Co.* v. *Prudence-Bonds Corp.*, 207 F. 2d 67 (2 Cir. 1953), 347 U. S. 904 (1954); *Chicago Sugar Co.* v. *American Sugar Refining Co.*, 176 F. 2d 1 (7 Cir. 1949), cert. denied, 338 U. S. 948 (1950). We see no reason why we should not hear an appeal from this element alone. It is surely a final judgment within the meaning of 28 U. S. C. §1291. See *Donovan* v. *Jeffcott*, 147 F. 2d 198 (9 Cir. 1945). We hold that when, as here, the question is not whether the district [fol. 77] judge should have allowed or disallowed particular items of costs, but is rather whether he exceeded, and therefore abused, his discretion, a judgment solely for costs is appealable. *Lichter Foundation, Inc.* v. *Welch*, 269 F. 2d 142 (6 Cir. 1959); *Kemart Corp.* v. *Printing Arts Research Laboratories*, 232 F. 2d 897 (9 Cir. 1956); *Prudence-Bonds Corp.* v. *Prudence Realization Corp.*, 174 F. 2d 288 (2 Cir. 1949); *Harris* v. *Twentieth Century-Fox Film Corp.*, 139 F. 2d 571 (2 Cir. 1943); 6 Moore, Federal Practice 1309 (1953).

In taxing costs, the Clerk included substantial amounts for air transportation of defendant's witnesses from as far away as Saudi Arabia to the place of trial. Judge Weinfeld reduced these assessments to a uniform allowance of $16.00 per witness, or the equivalent of 100 miles each way at $.08 per mile. Judge Weinfeld took this action as an exercise of judicial discretion, choosing not to rely upon the 100-mile limitation frequently imposed by the federal courts on their own power to assess transportation costs of witnesses brought from without the judicial district in

[1] Section 1920 provides:

"A judge or clerk of any court of the United States may tax as costs the following:

(3) Fees and disbursements for printing and witnesses."

which the trial court is sitting. We must therefore first determine the applicability of the 100-mile limitation. We hold the 100-mile rule inapplicable as a restraint upon the exercise of judicial discretion in the assessment of transportation costs for witnesses brought to trial.

The 100-mile rule appears to have evolved out of the limitation upon the subpoena power of a federal court to an area within the judicial district or 100 miles from the place of trial. See Federal Rules of Civil Procedure 45(e). There is not a shadow of a suggestion, however, in 28 U. S. C. §1920(3), which provides simply that "fees and disbursements for * * * witnesses" may be taxed as costs, that the court's power to issue a subpoena has anything whatever to do with what constitutes a recoverable disbursement for a witness. Indeed, 28 U. S. C. §1821 as amended in 1949 [fol. 78] provides clear authorization for the taxation of the actual expenses of travel for witnesses who come from afar. Section 1821 expressly provides that *in lieu of* the usual mileage allowance, actual travel expenses shall be allowed to witnesses who are required to travel between "the Territories and possessions, or to and from the continental United States." The great bulk of judicial authority supporting the 100-mile rule is to be found in cases decided prior to the enactment of the 1949 amendment which added the above-quoted provision. *Friedman* v. *Washburn Co.*, 155 F. 2d 959 (7 Cir. 1946); *Vincennes Steel Corp.* v. *Miller*, 94 F. 2d 347 (5 Cir. 1938). The vast majority of the more recent cases which approve the rule do no more than cite other cases, without considering the reasons which might lend support to it or weigh against it. Those cases decided subsequent to the 1949 legislation give it little or no attention. E.g., *Ludvigsen* v. *Commercial Stevedoring Co., Inc.*, 228 F. 2d 707 (2 Cir.) (dictum), cert. denied, 350 U. S. 1014 (1956); *Kemart Corp.* v. *Printing Arts Research Laboratories, Inc.*, 232 F. 2d 897 (9 Cir. 1956); *Perlman* v. *Feldmann*, 116 F. Supp. 102 (D. Conn. 1953), reversed on other grounds, 219 F. 2d 173 (2 Cir.), cert. denied, 349 U. S. 952 (1955). Moreover, in some recent cases in the lower courts the 100-mile rule has been flatly rejected. *Bennett Chemical Co.* v. *Atlantic Commodities, Ltd.*, 24 F. R. D. 200 (S. D. N. Y. 1959); *Maresco* v. *Flota Mercante*

Grancolombiana, S.A., 167 F. Supp. 845 (E. D. N. Y. 1958); *Bank of America* v. *Loew's International Corp.*, 163 F. Supp. 924 (S. D. N. Y. 1958).

Whatever the merits of the prior judicial rule, the Congress has not given any compelling evidence demonstrating an intention that it be continued. The reason for the addition of an express provision for actual travel expenses in the case of overseas travel is stated in the letter of the Assistant to the Attorney General, appended to and made [fol. 79] part of the report of the Senate Committee discussing the 1949 bill: "For overseas travel, it is recommended that witnesses be allowed their actual expenses at the lowest first-class rate available. There have been times when witnesses have been required to engage in such travel at a personal financial sacrifice." S. Rep. No. 187, 81st Cong. 1st Sess., reprinted in 1949 U. S. Code Cong. Serv. 1231, 1233.

The 100-mile rule finds as little support in reason as it does in the statutes. Whether a witness comes into court voluntarily or under the compulsion of a subpoena, he comes at the behest of the party for whom he appears as a witness. Either way, he serves the interest of the court in arriving at a just determination of the controversy. See *United States* v. *Sanborn*, 28 Fed. 299 (C. C. D. Mass. 1886) (opinion by Mr. Justice Gray). The fact that a subpoena does not issue because the witness is outside the reach of the court has nothing to do with the problem of how to allocate the cost of his appearance at the trial.

Nor can the 100-mile rule be defended as an allocation of the expenses of litigation in keeping with the practice of our courts to let such expenses fall on the party who incurs them. Fees for legal services are usually the largest single expense of litigation. In most cases, the prevailing party must pay such fees himself, even if he has come into court only to defend against an unjust accusation. There is no reason to extend this practice further. Certainly there is no reason to extend it by the curious means of limiting the recovery of travel expenses to 100 miles, a figure which may bear no relation to the distance actually traveled. As this case well illustrates, a 100-mile limitation is an anachronism in a day when the facility of world-

wide travel and the development of international business makes the attendance at trial of witnesses from far off places almost a matter of course.

[fol. 80] It has been suggested that the 100-mile rule serves a salutary purpose insofar as it erects some protection for the impecunious litigant who might otherwise hesitate to institute litigation in the fear that, if unsuccessful, he may bear the burden of transporting the defendant's witnesses. It seems plain, however, that any such solicitude for the rule is ill-founded. There may be cases in which the fair administration of justice requires that the losing party not be taxed to the full extent of the cost of producing witnesses for the other party. But it surely cannot be said that there will never be a case in which the losing party, in the interest of justice, should bear such costs. For example, had the positions in this case been reversed and Farmer been forced to produce witnesses from Saudi Arabia in order to defend against unjust charges of Aramco, one could hardly assert the justice of requiring Farmer to pay the costs of producing his witnesses himself, or risk the failure of his defense. Indeed, adherence to a rigid limitation on the taxation of travel expenses is more likely to work to the detriment of litigants with meager financial resources than a rule which leaves the allocation of costs to be determined according to the circumstances of each case.

There is no reason why a judge should be thought less capable of determining a proper allocation of the costs of witnesses' travel expenses than he is of allocating other expenses of trial, such as transcripts, which are committed without artificial limitation to the discretion of the trial judge. We do not hold that the full measure of travel expenses *must* be taxed against the unsuccessful party in each and every cause; we merely affirm the *power* of a federal district judge to exercise his discretion in the allocation of such costs. In exercising that discretion, the trial judge may well take account of the relative financial resources of the parties and the ability of the unsuccessful [fol. 81] litigant to bear the costs of the litigation, where the action has been prosecuted in all good faith. It is only

under such a rule that the impecunious litigant may be assured of his right to present effectively his case to judge and jury.

Concluding that the 100-mile rule is inapplicable, we turn to the particular items of costs taxed in the case at bar. At the first trial, Judge Palmieri allowed travel expenses totalling $3,715.21 for transportation of six witnesses, three of whom came from Saudi Arabia. For reasons stated below, we think that, except as to the travel expenses of witnesses Page and Swanson, totalling $2,064.00, it was within the discretion of Judge Palmieri to allow these expenses, and that his exercise of discretion should not have been disturbed. As the judge who presided at the first trial, Judge Palmieri had the greater opportunity to assess the necessity of particular costs incurred in defense of the action before him. This circumstance, considered in the light of the sensitive nature of the problems presented when one district judge is asked to pass upon the exercise of discretion by another, makes it inappropriate for a district judge to undertake an independent determination *de novo* of the costs allowed at a prior trial.

The plaintiff alleged that he had been hired to work as an ophthalmologist at the defendant's hospital in Saudi Arabia, and that he had been wrongfully discharged. In addition to disputing the terms of the employment contract, the defendant contended that the plaintiff had been discharged for just cause, specifically that he had performed an operation without first obtaining the results of certain tests, in violation of an express rule of the hospital and accepted standards of medical practice. The plaintiff's explanation for his discharge was that he had insisted upon truthfully reporting alleged findings that many American employees of the defendant in Saudi Arabia were contract- [fol. 82] ing trachoma, a tropical disease which leads to blindness. He claimed that his superiors had sought to intimidate him into suppressing his findings.

The witnesses whose travel expenses are in dispute gave evidence relating to the conflicting accounts of the plaintiff's discharge. There is no question that these witnesses had information which was essential to disprove the plaintiff's claims and establish the defense. Judge Weinfeld

determined, however, that in view of the heavy expense of producing them in court, the defendant should have relied on written testimony taken in advance of trial or, at least, should itself bear the costs of the witnesses' appearance at trial. We cannot agree.

It is difficult to imagine a more serious charge against an employer than that he suppressed evidence that employees ran the risk of contracting a serious disease. In such circumstances, the defendant could not possibly have been expected to adopt less than the most effective means of disproving the plaintiff's charges. We have had occasion in the past to note the importance of "live" witnesses in a trial before a jury. See *Arnstein* v. *Porter*, 154 F. 2d 464, 469-70 (1946). Moreover, in the first instance it is for the judge before whom the trial is had to gauge the necessity for transporting witnesses to the place of trial and to determine the propriety of assessing costs for such transportation against the unsuccessful litigant. We believe Judge Weinfeld should have deferred to Judge Palmieri with respect to those costs incurred in the first trial before him, just as we defer to him with respect to the costs of the trial at which he presided.

It appears, however, that two of the witnesses, Page and Swanson, occupied otherwise empty space in company planes on regularly scheduled flights to and from Saudi Arabia, so that as to them there was no actual travel expense incurred by the company and none should have been allowed. [fol. 83] Judge Palmieri allowed costs of $361.55 for transcripts of pretrial hearings, examinations before trial, and depositions. Judge Weinfeld reduced this amount to $76.05. Considering the importance of pretrial hearings and the discovery procedure under the Federal Rules, we cannot say that it was an abuse of discretion for Judge Palmieri to conclude that these costs were necessary elements of preparation for the first trial, and then to allow them. Similarly, we find it within Judge Palmieri's discretion to allow $1,812.30 for stenographer's fees incurred in compilation of the daily minutes of trial, as well as $180.02 for photostatic copies of certain bulky exhibits, as he found both of these items necessary to the proper conduct of the trial. See 28 U. S. C. §§1920(2), 1920(4). We hold that it was an

abuse of discretion in view of Judge Palmieri's findings as to their necessity, for Judge Weinfeld to disallow them.

We sustain in its entirety Judge Weinfeld's determination as to the costs incurred in the trial held before him. Although there are those of us who would have allowed traveling expenses beyond the 100-mile limit had the trial been before us, we cannot say that Judge Weinfeld abused his discretion in limiting costs for transportation of witnesses to the second trial, held before him, to a uniform allowance of $16.00 per witness.

We therefore reverse and remand with instructions to allow the costs as taxed by Judge Palmieri on the first trial, $6,601.08, less $2,064.00 taxed for the travel of Page and Swanson, or a total of $4,537.08 for the first trial, plus those items taxed by Judge Weinfeld on the second trial.

SMITH, *Circuit Judge* (with whom CLARK and HAYS, *Circuit Judges,* join) dissenting:

I dissent, both from the determination that Judge Weinfeld abused his discretion in fixing costs and from the [fol. 84] holding that he had discretion to tax costs for travel over the "100-mile limit." As a matter of judgment the judge taxing costs might have made larger allowances for photostats and transcript on both trials, because of the seriousness of the charges and the importance of the outcome to the parties. But the issues were not extraordinarily complicated nor the trial one of great length, the judge had the benefit of observation of the proceedings directly before him, and I would not hold the judge's decision that much of the expense was not really necessary, error or his limitation of costs so flagrant an error as to constitute an abuse of discretion.

More important, however, to future litigants is the rejection of the limitation almost universally observed in the federal courts heretofore, of the taxation of travel expenses as costs where the travel is from a point without the district and more than 100 miles distant. This decision not only breaks with the overwhelming weight of authority, and creates a different rule for costs in civil cases from that in admiralty, but also, as the majority indeed appears to admit, abandons the traditional scheme of costs in American courts to turn in the direction of the English practice

of making the unsuccessful litigant pay his opponent's litigation expense as well as his own. It has not been accident that the American litigant must bear his own cost of counsel and other trial expense save for minimal court costs, but a deliberate choice to ensure that access to the courts be not effectively denied those of moderate means. Of course there are arguments for the English system, in its discouragement of much litigation, but it is strange to find this court taking this time and opportunity to espouse it in the face of the contrary choice of the Supreme Court when the identical question of taxation of travel expense was before it in the formulation of the Admiralty Rules. I fear that the majority reads into the statute and rule [fol. 85] concerning reimbursement of witnesses and costs a direction as to where the ultimate burden of litigation expense must fall which just isn't there.

In reducing the allowance to the equivalent of mileage for 100 miles each way at 8¢ a mile, Judge Weinfeld did not rely on the limitation referred to which has heretofore been imposed by the courts on the power to assess mileage outside the district and more than 100 miles, but rather took the action as an exercise of discretion. We should consider, however, whether his ruling should be affirmed on the basis of the 100-mile limitation. I would hold that it should be so affirmed. Even though it is now accepted that a witness need not be under subpoena to collect his statutory fees and make the losing party liable for them as costs, it will be noted that most courts that have considered the question have imported the territorial limitation on the subpoena of witnesses[2] (within the district or

[2] Rule 45(e) of the Federal Rules of Civil Procedure.

(e) Subpoena for a Hearing or Trial.

(1) At the request of any party subpoenas for attendance at a hearing or trial shall be issued by the clerk of the district court for the district in which the hearing or trial is held. A subpoena requiring the attendance of a witness at a hearing or trial may be served at any place within the district, or at any place without the district that is within 100 miles of the place of the hearing or trial specified in the subpoena; and, when a statute of the United States provides

100 miles from the place of trial) to limit the distance for which mileage fees can be taxed as costs. *Ludvigsen* v. *Commercial Stevedoring Co., Inc.*, 228 F. 2d 707 (2 Cir.) (dictum), cert. denied 350 U. S. 1014 (1956); *Kemart Corp.* v. *Printing Arts Research Laboratories, Inc.*, 232 F. 2d 897 (9 Cir. 1956); *Spiritwood Grain Co.* v. *Northern Pac. Ry.*, [fol. 86] 179 F. 2d 338 (8 Cir. 1950) (dictum); *Friedman* v. *Washburn Co.*, 155 F. 2d 959 (7 Cir. 1946); *Vincennes Steel Corp.* v. *Miller*, 94 F. 2d 347 (5 Cir. 1948); *Perlman* v. *Feldmann*, 116 F. Supp. 102 (D. Conn. 1953), reversed on other grounds, 219 F. 2d 173 (2 Cir.), cert. denied 349 U. S. 942 (1955); *Kenyon* v. *Automatic Instrument Co.*, 10 F. R. D. 248 (W. D. Mich. 1950); *Brookside Theatre Corp.* v. *Twentieth Century-Fox Film Corp.*, 11 F. R. D. 259 (W. D. Mo. 1951), modified on another ground, 194 F. 2d 846 (8 Cir.), cert. denied 343 U. S. 942 (1952); *Barnhart* v. *Jones*, 9 F. R. D. 423 (S. D. W. Va. 1949); *Gallagher* v. *Union Pac. Ry.*, 7 F. R. D. 208 (S. D. N. Y. 1947); *Anonymous*, 1 Fed. Cas. 992 (C. C. S. D. N. Y. 1863); *Beckwith* v. *Easton*, 3 Fed. Cas. 29 (D. C. E. D. N. Y. 1870); *The Leo*, 15 Fed. Cas. 326 (D. C. E. D. N. Y. 1872); *Buffalo Ins. Co.* v. *Providence & Stonington S.S. Co.*, 29 Fed. 237 (C. C. S. D. N. Y. 1886); *The Vernon*, 36 Fed. 113 (D. C. E. D. Mich. 1888); *The Syracuse*, 36 Fed. 830 (C. C. S. D. N. Y. 1888); *Kirby* v. *United States*, 273 Fed. 391 (9 Cir. 1921), aff'd 260 U. S. 423. (The affirmance does not mention the problem); *Consolidated Fisheries* v. *Fairbanks, Morse & Co.*, 106 F. Supp. 714 (E. D. Pa. 1952); *Lee* v. *Pennsylvania R.R. Co.*, 93 F. Supp. 309 (E. D. Pa. 1952); *Commerce Oil Refining Co.* v. *Miner*, 198 F. Supp. 895 (D. R. I. 1961); *Reynolds Metals Co.* v. *Yturbide*, 258 F. 2d 321 (9 Cir. 1958), cert. denied 358 U. S. 840. Besides this authority, Moore approves the rule, although without discussion or analysis. 6 Moore, Federal Practice, pp. 1362-63. Contra, *Bennett Chemical Co.* v. *Atlantic Commodities, Ltd.*, 24

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therefor, the court upon proper application and cause shown may authorize the service of a subpoena at any other place.

(2) A subpoena directed to a witness in a foreign country shall issue under the circumstances and in the manner and be served as provided in Title 28, U. S. C. §1783.

F. R. D. 200 (S. D. N. Y. 1959); *Maresco* v. *Flota Mercante Grancolombiana, S.A.*, 167 F. Supp. 845 (E. D. N. Y. 1958); *Bank of America* v. *Loew's International Corp.*, 163 F. Supp. 924 (S. D. N. Y. 1958); *Knox* v. *Anderson*, 163 F. Supp. 822 (D. Hawaii 1958). Besides *United States* v. *Sanborn*, 28 Fed. 299 (C. C. D. Mass. 1886) (Gray, *J.*) which [fol. 87] rejects the 100 mile rule, there is other authority to the same effect from Massachusetts. See *Prouty* v. *Draper*, 20 Fed. Cas. 13 (C. C. D. Mass. 1842) (Story, *J.*). The First Circuit, however, cannot really be taken as having this position today. *The Governor Ames*, 187 Fed. 40, 50 (1 Cir. 1910) states the rule which had been followed in the District of Massachusetts but criticizes it. The District Court in *Commerce Oil Co.* v. *Miner*, *supra*, felt itself not bound by the old cases and went on to follow the great weight of authority.[3]

The sole remaining support for the rejection of the 100-mile limitation, therefore, would seem to be the District Court cases in the Southern and Eastern Districts of New York, and the single case from the District of Hawaii. With all deference, I feel that the rejection of the rule advocated by these few cases and carried out by our brethren in this case is based on an erroneous reading of the proviso added in 1949 to 28 U. S. C. §1821. The legislative history of the proviso, 1949 U. S. Code Cong. Service, pp. 1231-3, discloses only a concern for the inadequacy of

[3] From opinion by Judge Day, 198 F. Supp. 895, 899:

"In the absence of any authoritative holding by the Court of Appeals for the First Circuit, I am constrained to follow the reasoning and logic of the rule prevailing in the majority of the federal courts. This rule imposes no undue hardships on a litigant, in view of the liberal provisions of Rule 26 of the Federal Rules of Civil Procedure for the taking of the depositions of persons living outside the district where a case is pending, and for their use at the trial of such case. In the event a litigant feels that the testimony of a witness in person is essential, it is only right and proper that such litigant should bear the excess in cost incident to his personal appearance before the trial court. Accordingly, the allowance for mileage for witnesses residing outside this district shall be limited to 100 miles each way."

compensation to witnesses, as to rate per diem and mileage, and inadequacy in cases where mileage was below first class fare, with no discussion whatever by the Committee or the Assistant to the Attorney General of the eventual recovery [fol. 88] of the fees as costs by the prevailing party. It was necessary to obtain authority to pay the expenses of such witnesses at the lowest first class rate so that their attendance could be obtained without financial sacrifice on their part. It is noteworthy that the request came from the Department of Justice and not from the Administrative Office, and that it applies to witnesses in criminal as well as civil and admiralty causes. It is impossible to tell from the language of the statute itself whether the 100-mile rule was within the contemplation of the Congress at the time. Yet some indication of a lack of any purpose to affect the rule may be drawn from the title of the Act which added the proviso, "An Act to increase the fees of witnesses in the United States Courts and before United States Commissioners, and for other purposes" with no mention of any effect on taxable costs. It is hard to believe that the Assistant to the Attorney General was unfamiliar with the 100-mile rule in the light of the volume of government civil and admiralty litigation. This is particularly so in the light of the existence of Admiralty Rule 47,[4] by which the Supreme Court, as early as 1920, recognized and enforced the 100-mile rule. The Supreme Court's power over costs in admiralty was confirmed in the 1948 revision of Title 28, §1925, without any reference to Rule 47. It seems quite anomalous to argue that the Congress which in 1948 confirmed the power of the Supreme Court over costs in admiralty in the face of existing Rule 47 applying the 100-mile travel costs limit, indirectly rejected it a year later by a statute not limited to civil cases.

In the interest of precise statement, I would adopt the formulation of the Ninth Circuit: "Mileage allowable [fol. 89] should be that which was traveled *within* the dis-

[4] Admiralty Rule 47. Costs—travel of witnesses

Traveling expenses of any witness for more than one hundred miles to and from the court or place of taking the testimony shall not be taxed as costs.

trict, *or* actual mileage traveled in and out of the district up to 100 miles, whichever is the greater." *Kemart Corp. v. Printing Arts Research Laboratories, Inc., supra* at 904 (emphasis in original). The point is of more than formal interest in a circuit whose districts include some with distances of more than 100 miles from a seat of court. See *Hayden* v. *Chalfant Press, Inc.*, 281 F. 2d 543 (9 Cir. 1960).

Imposition of this limitation on costs is more in keeping with a fundamental choice in our legal system than allowing an unlimited reimbursement would be. Unlike some other countries we have always left the major portion of the expense of litigation to fall ultimately upon the party who bears it in the first instance. Recovery of attorney's fees and major expenses of preparation for trial is with us the exception rather than the rule. If perhaps, the victor in a just cause is not made entirely whole, the doors of our courts are not closed to the small litigant who cannot risk being ruined by the imposition of his adversary's full expenses. The witness, of course, still recovers his full statutory fees under 28 U. S. C. §1821. The effect of the existing rule is to divide this burden between the party summoning him and the party liable for the statutory costs, with the party who chooses to summon him bearing the larger portion of the costs when extensive travel is chosen in place of testimony by deposition or letters rogatory. I submit that this result will best promote the fair administration of justice in the district courts.[5]

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[5] Judge Moore's language in *Barnhart* v. *Jones, supra*, is often quoted:

> "• • • The *effect* of a subpoena served outside the district is limited to 100 miles from the place of trial, and it seems only reasonable to infer that Congress must have intended to limit the taxation of mileage to the same distance. If a court in a country as vast as ours permitted taxation of the entire mileage of witnesses without limitation as to distance, an unbearable burden would be imposed upon the conduct of litigation. Such a course might in some cases lead to a result whereby costs would be greater than the amount of the recovery.
>
> "Economy in litigation is an essential element of justice. Taxation of unlimited mileage allowances is in derogation of this principle, and cannot be permitted."

[fol. 90] Judge Weinfeld was therefore correct in result in limiting the travel expense allowed as costs to each witness from without the district to $16.00—8¢ a mile for 100 miles each way for each trial.

Turning now to his rulings on other items we must determine whether there was an abuse of discretion in his disallowance of any of those taxed by the Clerk. At the outset we are faced with the fact that the judgment after the jury disagreement on the first trial was vacated by the reversal on appeal, so that Judge Palmieri's findings as to the necessity and reasonableness of such items as transcript and photostatic copies of portions of exhibits for use at the trial were not binding on Judge Weinfeld in reviewing costs at the time of final judgment. These are matters in which, however, it would seem that great deference should be given by the second judge to the opportunity of the first judge, here Judge Palmieri, to weigh the situation then before him in assessing necessity. The second judge does, however, have an advantage of the additional developments before him subsequent to the first trial, which he may take into consideration. In the light of this, although the writer would as an original matter have been inclined to make the allowance made by Judge Palmieri, at least as to the necessity of photostats[6] and transcripts of pretrial depositions and perhaps also as to the necessity of daily transcript,[7] there is surely ground for difference of [fol. 91] opinion as to the necessity of photostats and transcript, let alone daily copy, in a trial of these rather simple, though hard fought, issues. It was therefore not an abuse of discretion to disallow the items, and as pointed out by the majority, our review of these items is not to determine whether the findings of Judge Weinfeld as to necessity and reasonableness are correct, but whether they are so grossly in error as to constitute an abuse of judicial discretion.

I would affirm the judgment for costs of $831.60.

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[6] Compare *Galion Iron Works & Mfg. Co.* v. *Beckwith Machinery Co.*, 25 F. Supp. 591 (W. D. Pa. 1938) with *Raffold Process Corp.* v. *Castanea Paper Co.*, 25 F. Supp. 593 (W. D. Pa. 1938).

[7] See *Bank of America* v. *Loew's International Corp.*, *supra*; *Perlman* v. *Feldmann*, *supra*.

CLARK, *Circuit Judge* (concurring in the dissent of Judge SMITH):

I concur completely in Judge Smith's dissent, expressing, as it does, a wise public policy, buttressed by the overwhelming weight of authority and by long settled federal practice. But I venture a brief additional statement because of the great practical importance of the issue and because the ambiguities and policy conflicts of the majority opinion will require a re-evaluation of the problem either judicially or by rule-makers or legislators. The problem may be made concrete by considering the difficulties hereafter facing district court clerks and judges. Up to now—as shown by inquiry, as well as by the long list of precedents—the clerks have applied the 100-mile limitation on travel of witnesses routinely and substantially without dispute. Now they are faced with two opposing policy approaches and will not be able to act when the issue arises without a full-dress hearing and a court review.

In its attempt to straddle the division of policy disclosed below, the majority decision has all the earmarks of a compromise result. There is nothing inherently wrong in this; at times a compromise among views may be quite desirable. But care must be taken that it does not lead to illogical or conflicting results. Here in practical consequence we [fol. 92] have lavish travel fees allowed on the round of litigation which the defendant lost, and denied on the round it won. The difficulty arises because the decision departs from the wise normal rule that one judge alone is responsible for the ultimate decision of a cause on trial and that this responsibility is not to be shared with or apportioned among those who have made preliminary or interlocutory rulings. As a matter of fact the decision does great injustice to the first judge here, because it holds him to rulings made at a preliminary stage, before much that is relevant had happened, and does not give him an opportunity to review and revise his actions in the light of later events. I regard the responsibility as centered in Judge Weinfeld; but if, contrary to this, we force him to divide it with Judge Palmieri, we should at least have given the latter the op-

portunity to review his holdings in the light of the full record.

Again it appears that the majority have lacked final courage to reach a completely hard-boiled result, as of course is shown by their reduction of the quite outrageous sum claimed of $11,900.12 (composed mainly of the cost of defendant's bringing its own employees around the world) to $4,537.08, plus the cost allowed of the second trial, apparently $335.55. This sum, totaling nearly $5,000, is not an inconsiderable item; but ironically that required some questionable rulings to reach it. Thus the expenses of witnesses Page and Swanson, totaling $2,064, were disallowed because they occupied otherwise unused space on a company plane. Except on the theory that two wrongs make a right, this cannot be justified, for it is settled on the authorities that costs for witnesses legally due are taxable, whether they have been paid to the witness or not. The taxing authority cannot be expected to go into the issue whether the witness may not have appeared voluntarily, making no claim for fees.

[fol. 93] There are other factors which, to me, point also to the injustice of the result. At an early stage of the case, we very pointedly criticized lavish travel expenditures in reversing an order for a bond for costs which plaintiff was unable to furnish. *Farmer* v. *Arabian American Oil Co.*, 2 Cir., 285 F. 2d 720. When the defendant persisted, it would seem that the extra expenditures should have been at its own risk and from its own treasury. The majority are surely ill-advised in trying to claim support from the supposed equities; at best shifting sands, here these obviously favor the plaintiff as much as the defendant.[1] Nor is the supposed need of oral testimony an adequate excuse; the jury, in my judgment, is not so stupid as to need to see

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[1] Thus the defendant's defense of its discharge of the plaintiff was an attack on the latter's professional competence, calling forth as bitter emotions as did the plaintiff's attack on defendant's hospital conditions. And there seems to have been a great deal of evidence not closely relevant involving plaintiff's marital, litigious, and emotional instability. It should be recalled that it took two juries to settle the plaintiff's fate; the first jury disagreed.

the defendant's employees in person to decide where the truth lies. And in the federal system we have provided ample means of securing testimony through depositions and interrogatories, making it reasonable, natural, and practical to limit repayment of travel costs to those only who can be required to come to court by exercise of the court's subpoena power. Indeed, heretofore we have taken the position that a party's preference for oral testimony must be weighed against the burden to his opponent, and an order for depositions or interrogatories must be substituted when travel costs will be burdensome. *Hyam* v. *American Export Lines*, 2 Cir., 213 F. 2d 221, 222-223 (per Harlan, *J.*); *Richmond* v. *Brooks*, 2 Cir., 227 F. 2d 490, 492. Nor is the claim at all realistic that these large allowances may at times favor the impecunious litigant. Such a liti- [fol. 94] gant will not have the cash to advance originally; nor can he take the chance of being saddled with the cost ultimately. As Judge Smith so well demonstrates, this argument represents an approach to the English system, never accepted by us because of our conviction that it "favored the wealthy and unduly penalized the losing party."[2] Here the bill of costs, obviously ruinous to a plaintiff who could not afford a cost bond, can mean little more than an instrument of revenge to this great corporation. I submit that it is not wise policy, or consistent with our traditions, to put the decision of the lavishness of the trial for all practical purposes in the hands of the winning litigant.

Judge Smith gives a fair indication of the strength of the precedents for this traditional view, including the Supreme Court's Admiralty Rule 47, although he does not exhaust the available number.[3] With the recent cases repudiating the few earlier cases contra in the First Circuit, see *Commerce Oil Refining Corp.* v. *Miner*, D. C. R. I., 198 F. Supp. 895, the majority decision is supported only by certain district court decisions here which do not repre-

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[2] *Conte* v. *Flota Mercante del Estado*, 2 Cir., 277 F. 2d 664, 672, per Friendly, *J.*, citing Goodhart, *Costs*, 38 Yale L. J. 849, 872-877 (1929).

[3] See, e.g., Annotation 4 to 28 U. S. C. §1821.

sent the law of our Circuit.[4] And neither statute nor rule [fol. 95] defines of what these court costs shall consist.[5] As Judge Smith demonstrates, the decision represents an erroneous reading of the 1949 proviso to 28 U. S. C. §1821 and its legislative history.[6] The result reached below, D. C. S. D. N. Y., 31 F. R. D. 191, 197, of $831.60—a not insubstantial sum in itself—is thus based upon strong precedent and long continued, substantially unbroken custom. It is fair and just. It should have been sustained here.

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[4] *Bank of America* v. *Loew's International Corp.*, D. C. S. D. N. Y., 163 F. Supp. 924, per Dawson, *J.*; *Bennett Chemical Co.* v. *Atlantic Commodities, Ltd.*, D. C. S. D. N. Y., 24 F. R. D. 200, per Dawson, *J.*; *Maresco* v. *Flota Mercante Grancolombiana, S.A.*, D. C. E. D. N. Y., 167 F. Supp. 845, per Byers, *J.* The case of *Knox* v. *Anderson*, D. C. Hawaii, 163 F. Supp. 822, rests on a special statutory provision. See note 6 *infra*. Against these may be cited such important Second Circuit cases as *Perlman* v. *Feldmann*, D. C. Conn., 116 F. Supp. 102, 115, per Hincks, *J.*; *Gallagher* v. *Union Pac. R. Co.*, D. C. S. D. N. Y., 7 F. R. D. 208, per Caffey, *J.*; *Ryan* v. *Arabian Am. Oil Co.*, D. C. S. D. N. Y., 18 F. R. D. 206, 208, per Bondy, *J.*; and other earlier cases cited by Judge Smith.

[5] Thus F. R. 54(d) does not define costs, but leaves their fixing to statute or decisional law. And 28 U. S. C. §1920 defines certain costs such as the fees of the clerk and marshal, but is pointedly unspecific in its subd. (3) covering "Fees and disbursements for printing and witnesses."

[6] This proviso, 63 Stat. 65, to the standard mileage allowance statute, 28 U. S. C. §1821, allowing actual travel expenses to witnesses "attending in any court of the United States * * * who are required to travel between the Territories and possessions, or to and from the continental United States," was obviously passed with no intent to change the long standing federal practice, as Judge Smith demonstrates. Moreover, its wording does not bear the burden attempted to be put upon it, for by its terms it covers travel only between the place of trial and the places listed in the statute which do not include foreign countries. And the comment from the Assistant to the Attorney General adds nothing; the reference to "overseas travel" is to travel to or from the Territories and possessions. The only case on the proviso, *Knox* v. *Anderson*, D. C. Hawaii, 163 F. Supp. 822, involving travel between California and Hawaii (i.e., within its exact terms) expressed some reluctance to construing it as without the usual federal rule.

WATERMAN, *Circuit Judge* (in separate statement):

I dissent from the result reached by the majority of the court and agree with my brothers Clark, Smith and Hays that the judgment for costs of $831.60 should be affirmed.

I hold a somewhat different view from my colleagues and therefore submit this separate statement. It is my belief that Judge Weinfeld properly treated the motion before him as a motion addressed to his discretion and that he properly exercised his discretion in his disposition of that [fol. 96] motion. I differ from the position taken in the opinions of the dissenters relative to the power Judge Weinfeld could exercise over the major items of dispute between the parties—the items relating to the proper taxation of transportation expenses of certain of the prevailing party's witnesses who were not subpoenaed. See Judge Weinfeld's discussion at 31 F. R. D. 191, 195-196.

When a motion to review the taxation of witness costs is presented to a district judge he surely should have in mind the rule my three dissenting brothers would inflexibly apply—the rule that recoverable witness mileage should be limited as of course to travel within the district, or, in the event of travel outside the district, to 100 miles of the place of hearing. Nevertheless, such a motion is a proper one to make, and the only purpose of the motion is to have the judge's independent judgment exercised. It is obvious that Judge Weinfeld did have this long-standing rule in mind when he so properly held that the costs movant requested should not be allowed.

I would lay down a rule that, in the taxation of costs "as of course to the prevailing party" by the clerks of our district courts, the so-called "one hundred mile rule" must be followed in the first instance, but I would not take away from a district judge the power to modify that taxation if motion be made to the judge so to do. There is always the rare case—which neither Judge Weinfeld nor I would find this case to be—where taxation inflexibility can work scandalous injustice.

[fol. 97]

IN UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Present: Hon. J. Edward Lumbard, Chief Judge, Hon. Charles E. Clark, Hon. Sterry R. Waterman, Hon. Leonard P. Moore, Hon. Henry J. Friendly, Hon. J. Joseph Smith, Hon. Irving R. Kaufman, Hon. Paul R. Hays, Hon. Thurgood Marshall, Circuit Judges.

HOWARD FARMER, Plaintiff-Appellant,

v.

ARABIAN AMERICAN OIL COMPANY, Defendant-Appellant.

JUDGMENT—November 6, 1963

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court as to the determination of costs incurred in the trial before Hon. Edward Weinfeld, U. S. D. J., be and it hereby is affirmed but as to the costs taxed by Hon. Edmund L. Palmieri in the first trial, said order be and it hereby is reversed and that the action be and it hereby is remanded with instructions to tax costs in accordance with the opinion of this court with costs to the defendant-appellant.

A. Daniel Fusaro, Clerk.

[fol. 98] [File endorsement omitted]

[fol. 99] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 100]

IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Civ. No. 111-1103

HOWARD FARMER, Plaintiff,

—against—

ARABIAN AMERICAN OIL COMPANY
(a Delaware corporation), Defendant.

ORDER ON MANDATE—December 18, 1963

Defendant having appealed from the orders of the Honorable Edward Weinfeld, United States District Judge, entered on September 11, 1962, and September 28, 1962, which disallowed items of costs taxed in favor of defendant by the Clerk of the United States District Court for the Southern District of New York on July 7, 1962, and said appeal having been heard by the United States Court of Appeals for the Second Circuit and said Court of Appeals having entered its judgment, dated November 6, 1963, providing:

> "Appeal from the United States District Court for the Southern District of New York and was argued by counsel.
>
> On consideration whereof, it is now hereby ordered, adjudged and decreed that the order of said District Court as to the determination of costs incurred in the trial before Hon. Edward Weinfeld, U.S.D.J., be and it hereby is affirmed but as to the costs taxed by Hon. Edmund L. Palmieri in the first trial, said order be and it hereby is reversed and that the action be and it hereby is remanded with instructions to tax costs in accordance with the opinion of this court with costs to the appellant."

and the mandate of the United States Court of Appeals for the Second Circuit, which includes the judgment, bill of costs and opinion of said court, having been received and filed in this court,

[fol. 101] Now, on motion of White & Case, attorneys for defendant, it is hereby,

Ordered, Adjudged and Decreed, that the aforesaid judgment of the United States Court of Appeals for the Second Circuit be and the same hereby is made the order and judgment of this court; and it is further

Ordered, Adjudged and Decreed, that the following costs are allowed:

(a) The costs as taxed by the Honorable Edmund L. Palmieri by orders made by him on December 10, 1959, and February 9, 1960, in the sum of $6,601.08, less the sum of $2,064.00, the amount allowed by the Honorable Edmund L. Palmieri for the travel for Dr. Robert C. Page and Marjorie Catherine Swanson, and disallowed by the Court of Appeals, or a total of $4,537.08; and

(b) The sum of $335.55, the total of those items of costs allowed by the Honorable Edmund L. Palmieri by his orders dated September 11; 1962, and September 28, 1962,

making a total of $4,872.63; and it is further

Ordered, Adjudged and Decreed, that defendant, Arabian American Oil Company, 505 Park Avenue, New York, New York, recover of plaintiff, Howard Farmer, c/o William V. Homans, Esq., 122 East 42nd Street, New York, New York, the sum of $4,872.63, and the sum of $766.50, [fol. 102] the costs allowed and taxed in the United States Court of Appeals, or a grand total of $5,639.13, and that said defendant have execution therefor.

Edward Weinfeld, U. S. D. J.

[Stamp—Rec'd in Clerk's Office 12/19/63—J.A.M.]

Dated: New York, New York
December 18th, 1963

Judgment Entered This 19th day of December, 1963.
James E. Valeche, Clerk.

[File endorsement omitted]

[fol. 103]

SUPREME COURT OF THE UNITED STATES

No. 804—October Term, 1963

HOWARD FARMER, Petitioner,

vs.

ARABIAN AMERICAN OIL COMPANY.

ORDER ALLOWING CERTIORARI—March 9, 1964

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted. The case is consolidated with No. 808 and a total of two hours is allotted for oral argument.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 104]

SUPREME COURT OF THE UNITED STATES

No. 808—October Term, 1963

ARABIAN AMERICAN OIL COMPANY, Petitioner,

vs.

HOWARD FARMER.

ORDER ALLOWING CERTIORARI—March 9, 1964

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted. The case is consolidated with No. 804 and a total of two hours is allotted for oral argument.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.